No. 2290

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the TOWN OF FORSYTH,

Plaintiff in Error,

vs.

E. W. CRELLIN, W. H. JACKSON, and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE & IRON COMPANY,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Records of U.S. Circuit
Court of Appeals
827

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Names and Addresses of Attorneys of Record.

F. V. H. COLLINS, Esq., of Forsyth, Montana,

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Defendant and Plaintiff in Error.

EDWARD HORSKY, Esq., of Helena, Montana,

Attorney for Plaintiff and Defendant in Error.

In the District Court of the United States in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

BE IT REMEMBERED that on the 15th day of April, 1911, the complaint was filed herein, being as follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

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Messrs. GUNN, RASCH & HALL, of Helena, Montana,

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E. W. CRELLIN, W. H. JACKSON, and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Complaint.

Now comes the plaintiffs in the above-entitled action, and for cause of action against defendant complain and allege:

1. That plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, are now, and were during all the times hereinafter mentioned, copartners, doing business under the firm name and style of the Des Moines Bridge & Iron Company, with their headquarters and principal place of business in the city of Des Moines, in the State of Iowa; that they and each of them are residents and citizens of the State of Iowa; that the amount in controversy in this suit exceeds the sum of $2,000.00, exclusive of interests and costs.

2. That the City of Forsyth, the defendant herein, is now an incorporated city of the third class of the State of Montana, and was at a time prior to the commencement of this action, an [2] incorporated town in the State of Montana.

3. That on or about the 25th day of May, 1907, the said defendant entered into a certain contract in writing with the plaintiffs herein, for the construction, building and erection of a certain waterworks system and plant in the said town, now city, of Forsyth, a copy of which contract is hereto attached, marked Exhibit "A," and hereby made a part of this complaint.

4. That in and by the terms and conditions of said contract, plaintiffs herein agreed to furnish all of the material and labor, necessary for the construction of, and to construct a waterworks system and plant in the town, now city of Forsyth, according to the detailed plans, specifications and drawings thereof by the Iowa Engineering Company of Clinton, Iowa, the engineers of the said town, in the planning of said waterworks system and plant, and filed in the office of the Town Clerk of said town, at and for the consideration and compensation agreed to be paid to the said plaintiffs, by the town, now city of Forsyth, as set forth and described in said contract; that immediately after the execution of said contract, and on or about the 25th day of May, 1907, plaintiffs under, in pursuance, and by, and by virtue of said contract and the said plans, specifications and drawings therein referred to, commenced the work and labor on said water plant and system, and commenced the furnishing of the materials, machinery and fixtures necessary for and to be used in the construction of the same, according to the terms and conditions of said contract, plans, specifications and drawings, and continued thereafter in the perform-

ance of such labor and work and the furnishing of such materials, machinery and fixtures, and duly performed all the terms, stipulations and conditions of said contract, plans, specifications and drawings, on their part to be performed, and that said waterworks system and plant were fully completed by plaintiffs, and [3] turned over to defendant, and the same duly accepted by the said defendant, and that said defendant is now, and ever since the said acceptance thereof, has been in full and absolute control of the same and the whole thereof.

5. That at the said contract prices for said work and labor, and for materials, machinery and fixtures to be, and which were furnished, in the construction and building of said waterworks system and plant, by plaintiffs to defendant, at its request and under its orders, and by virtue of the terms of said contract, the total amount due and to be paid plaintiffs, was the sum of $38,827.26.

6. That from time to time during the progress of the construction of said water plant, as contemplated in said contract, various estimates were made of work done and material furnished, and duly presented to the defendant, which were allowed and paid by said defendant to said plaintiffs under the terms of said contract, the sum of $31,460.44.

7. That the said contract was fully completed by the plaintiffs herein, and the said waterworks and system were turned over to the said defendant on or about the 30th day of April, 1908, and duly accepted by said defendant as being completed under and in accordance with the terms of said contract, and that said defendant has ever since said date had the sole

and exclusive possession and control of said waterworks plant and system, and has used the same for the purpose intended.

8. That on or about the —— day of April, 1908, plaintiffs presented an itemized statement in writing to the said City Council of the said defendant, in the form of a final estimate, account and claim for materials furnished and labor performed under the terms of said contract, which said itemized statement in writing, final estimate, account and claim was in the words and figures following, to wit: [4]

"April 28, 1909.

Honorable Mayor and Council,
Forsyth, Montana.

Gentlemen:

Having entirely completed our waterworks contract with your city we hereby submit the following estimate of material furnished and labor performed.

500′	10″	cast pipe laid	¢	$2.63.....	$1315.00
6167	8″	wood " "	"	.78.....	4810.26
7405	6	" " "	"	.62.....	4591.10
14152	4″	" " "	"	.49 ½....	7005.24
9558#		special castings	"	.05 ½....	525.69
		Wood plugs			10.00
					18257.29
2–10″		Valve	¢	$35.00.. 70.00	
8–8″		Valve	"	29.00.. 232.00	
9–6″		"	"	24.00.. 216.00	
15–4″		"	"	19.00.. 285.00	
31		Hydrants	"	43.00.. 1333.00	2136.00
		Carried Forward.....		....20393.29	

Brought Forward		20393.29
962′ 4″ wood pipe not laid at .21	202.02	
375′ 6″ " " " " " .32	120.00	
74′ 8″ " " " " " .42	31.08	
Drayage on same	6.00	
10% on same as per contract	35.31	394.41
Pumping station contract	$3465.00	
Extra labor and material	5.05	
Painting contract	30.00	
Material for same	23.13	3524.18
Boilers completed	3250.00	
Extending breeching and two check valves	21.73	3271.73
Pumping plant complete		2900.00
Water heater		166.00
Seepage well complete	$575.00	
6′ extra depth	191.65	766.65
Seepage Galleries Complete	800.00	
Extra Roofing on same	20.00	820.00
Carried Forward		$32236.26
Brought forward		$32236.26
Reservoir Contract Complete	$5775.00	
Extra Columns	270.00	
Four vintilators	10.00	
69 bbls cement due to changing specifications @ $3.50	311.50	

[5]

Labor screening gravel, 225 yds. @ $1.00	225.00	$6591.50
		38827.96
Recd. cash as per estimate		31460.44
		7367.32
Add. for steel wheelbarrow		3.00
Less to retain for pump rods, *stem* gauge,		7370.32

Respectfully,
DES MOINES BRIDGE & IRON CO.,
By H. W. SMITH."

9. That in the records of a meeting of the said City Council of said defendant, the town of Forsyth, held on May 7th, 1908, the following appears:

> "The Committee on Fire, Light and Water presented and read by the Clerk, on motion of Alderman Blum, seconded by Alderman Blair, the report of the Committee on Fire, Light and Water was adopted and approved, and the final estimate of the Des Moines Bridge & Iron Company was allowed in accordance therewith, and the report was ordered made a part of these minutes. Roll-call: Blum, Murri, Irwin and Blair, all voting Aye; motion carried."

10. That the said defendant, the City of Forsyth, acting by and through its City Council, duly accepted and considered said final estimate, account and claim as having been properly presented to the City Council, and said defendant allowed the same, and paid

thereon to plaintiffs, the sum of $3,500.00, on the 22d day of May, 1908. That no objection was ever made to said final estimate, account and claim for monies due to plaintiffs from the defendant, under and by virtue of the terms of said contract, either to the form thereof as presented, or otherwise, but that the said defendant, by and through its council, considered and acted upon, and allowed said final estimate, account and claim as regular in form and properly presented, and paid to these plaintiffs [6] thereon the said sum of $3,500.00; wherefore, plaintiffs allege that whatever, if any, objection there might have been to the form of said final estimate, account or claim, or to the presentation thereof, and the amount thereof, were by the action of said defendant, by and through its City Council, duly waived, and defendant is estopped and cannot be heard to make any objection in the premises.

11. That there is yet due and unpaid as aforesaid from said defendant to the said plaintiffs, the sum of $3,870.32, and that said defendant has wrongfully and unlawfully neglected and refused to pay the same, or any part thereof, since the 1st day of June, 1908, although often requested so to do.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of $3,870.32, together with interest thereon at the rate of 8% per annum, from the 1st day of June, 1908, and for costs of suit.

CLAYBERG & HORSKY and
GEO. W. FARR,
Attorneys for Plaintiffs. [7]

State of Montana,
County of Lewis and Clark,—ss.

John B. Clayberg, being first duly sworn, on oath deposes and says that he is the attorney for the above-named plaintiffs, E. W. Crellin, W. H. Jackson and B. N. Moss; that he has read the foregoing complaint and knows the contents thereof, and that the matters stated therein are true to affiant's best knowledge, information and belief, and that the affiant makes this affidavit because of the absence of said plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, from the County of Lewis and Clark.

JOHN B. CLAYBERG.

Subscribed and sworn to before me this 14th day of April, 1911.

[Seal] EDWARD HORSKY,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires on the 23d day of December, 1913. [8]

Exhibit "A" [to Complaint—Contract].

CONTRACT.

THIS AGREEMENT made and entered into this twenty-fifth day of May, A. D. 1907, by and between E. W. Crellin, W. H. Jackson, and B. N. Moss, co-partners doing business under the firm name and style of the "Des Moines Bridge & Iron Company," of Des Moines, Iowa, hereinafter called the contractor, and the Town of Forsyth, a municipal corporation, under the laws of the State of Montana, of

Rosebud County, Montana, hereinafter called the Town:

WITNESSETH:

That for and in consideration of the payments, covenants and agreements hereinafter set forth, to be performed by the Town, the Contractor does hereby agree to furnish all the material and labor necessary for the construction of, and to construct a water-works system in and for the said Town of Forsyth, according to the detailed plans, specifications and drawings therefor by the Iowa Engineering Company of Clinton, Iowa, engineers for said town in the planning of said water-works system, as filed in the office of the Town Clerk of said Town, and all and sundry the ordinances, resolutions, motions and notices to contractors, pertaining thereto, and the proposal of the contractor, above named, submitted on the 3rd day of May, A. D. 1907, by said contractor to said Town, all of which are hereby referred to and by this reference, are made a part of this Contract, and as [9] described in said plans and specifications, the said Contractor does hereby further agree to finish and complete said water-works system on or before the 10th day of November, A. D. 1907, in good, substantial and workmanlike manner and in all respects as required by said plans and specifications therefor a copy of which is hereto attached, hereof made a part, and marked exhibit "A"; as is a copy of the proposal of the Contractor hereinabove referred to, which is hereto attached, hereof made a part, and marked exhibit "B"; and said contractor does also hereby agree to fully indemnify and save

harmless the said town from all and every claim for damages or damages which may be presented to said Town, or which said Town may be subjected to or sustained by reason of any fault or neglect on the part of the said Contractor, their agents, servants, employees or any person or persons acting by, under or through them, the said Contractor, during the progress of said work or by or from any defect therein, resulting from the fault, neglect or failure of the said Contractor to do and perform the same as set forth and provided in the specifications thereof.

In consideration of the foregoing covenants and agreements, herein set forth, on the part of said Contractor to be done and performed, said Town does hereby agree to well and truly pay to said Contractor out of the fund hereinafter stated, and in the manner hereinafter set forth, for the construction of said water-works system, as hereinafter stated, viz: [10]

For:

One pumping station including foundation for smoke stack, complete	3465.00
Two 80-horse power boilers, including steel smoke-stack, all complete, as per boiler specifications hereto attached, hereof made a part and marked exhibit "C"	3250.00
One water heater, complete	166.00
Two collecting seepage galleries, all complete	800.00
One seepage well and intake, using 10" cast iron pipe, complete	575.00
One compound Duplex Million Gallon	

pump using Smith-Vaile Compound Duplex Pumping Engine, 12 & 18x 10x12 full brass lined and fitted as per pump specifications hereto attached, hereof made a part and marked Exhibit "D"	2900.00
One 300,000 gallon storage reservoir as per plan and specifications, complete	5775.00
500 ft. more or less 10″ cast iron pipe, as per lineal foot laid	2.63
6,280 ft. more or less of 8″ wood pipe, per lineal foot laid	.78
7,480 ft. more or less of 6″ wood pipe per lineal foot laid	.62
11,100 ft. more or less of 4″ wood pipe per lineal foot laid	.49½
All special fittings for pipe line per lb...	.05½
32 hydrants, more or less, 4″ inlet, each..	43.00
Gate valves, 10″ each.....	35.00
" " 8″ "	29.00
" " 6″ "	24.00
" " 4″ "	19.00

The ditch for all the pipe above provide for to be 5½ feet deep. [11]

It is understood and agreed, however, that all of the above prices cover the complete installation of the said water works system, together with all and every the necessary fixtures, piping, connections, water valves or equipment, called for in the plans and specifications thereof or that may be necessary to operate said machinery and said system, and also the whole of said buildings, machinery and water works

system, completed in all and every respect and ready for operation, and the said town hereby specifically reserves the right to, and it is understood and agreed that said town may, at its pleasure and at all times before the completion of said Water-Works system by said Contractor, make any reasonable increase or decrease in the number of feet of pipe and the corresponding Hydrants, Valves, Boxes, etc., that may be necessary to properly equip such mains, paying therefor to said Contractor, or said Town, receiving credit therefor, at the rate herein named, it also being understood and agreed that any addition to the number of feet of water main herein set forth, required hereunder by said Town, and stated definitely, shall entitle the Contractor to a corresponding increase of time within which to install the same;

It is further understood and agreed that for extra material and labor that may be furnished to the Town by the Contractor upon order from the Council thereof and for which the Contractor may be entitled to compensation, according to the plans and specifications for said Water-works System, the Contractor, when the same is not expressly provided for in this Contract shall be paid, the actual cost thereof plus [12] ten per cent, and the said Town further agrees that all payments for work under this contract shall be made in monthly installments of eighty-five per cent of the Contract price on the completed work being any materials built in place. The balance of the contract price herein provided for, to be paid to the Contractor upon the completion and final test of said Water-works System which

test shall be to the satisfaction of the Town Council and upon the acceptance of said System by the Town Council of said town, and by its duly qualified and acting Engineer, which acceptance shall be within thirty days from and after the proper completion of the said Water-works System in all respects as provided for by this Contract, and that all such payments shall be made by warrants of said Town drawn upon its Water-works fund by order of the Town Council and Duly signed by its Mayor and Clerk.

It is further understood and agreed that the Town shall at all times provide and have available for the Contractor all necessary rights of way for buildings, pipe lines and fixtures for the installation of said Water-works System in accordance therewith, and also for any extensions thereof which may be ordered hereunder, and it is also provided that if the work herein provided for be not completed by the 30th day of November, A. D. 1907, the Contractor shall be liable for and shall pay to the Town the sum of Ten and no/100 ($10.00) Dollars per day for each and every day thereafter until the final completion of said work, which sum is mutually agreed upon hereby as the liquidated damage said Town shall sustain in event of the non-completion [13] of said work, however, it is agreed that payment thereof shall not be enforced by said Town against the Contractor upon proof satisfactory to the Town being furnished by the Contractor showing conclusively that the delay in completion of said work was caused by circumstances over which the Contractor had no control and the Contractor hereby agrees to fur-

nish to the said Town a good and sufficient bond in the sum of Thirty Thousand and no/100 ($30,000.00) Dollars, conditioned for the full, true and faithful performance of all and sundry the terms and conditions of this contract executed by a Surety Company, which Company must be licensed to transact such business for and within the State of Montana, which said bond shall be in form and substance satisfactory to and to be approved by the Town Council of said town, all of which shall by said Contractor be done together with the execution of this agreement from and within 30 days after May 3rd, 1907.

IN WITNESS WHEREOF the Town of Forsyth has caused this contract to be executed in the name of said Town by its duly elected, qualified and acting Mayor and to be sealed with the seal of said Town and attested by its duly appointed, qualified and acting Town Clerk, both having been first duly and lawfully authorized thereunto, and the said Contractor has caused these presents to be executed in its partnership name all being done in duplicate the [14] day and year in this certificate first above written.

THE TOWN OF FORSYTH,
By A. R. SICKLER,
Mayor.
Attest: S. H. ERWIN,
Town Clerk.

DES MOINES BRIDGE AND IRON COMPANY.

W. H. JACKSON.
B. N. MOSS.
E. W. CRELLIN.

The foregoing contract as altered, amended and executed on the 25th day of May, 1907, by W. H. Jackson, B. N. Moss and E. W. Crellin, copartners doing business under the firm name and style of The Des Moines Bridge & Iron Company of Des Moines, Iowa, is hereby approved and ratified by the Town of Forsyth, and the said Town of Forsyth has caused its duly elected, qualified and acting Town Clerk to seal and attest the same at Forsyth, Montana, this 7th day of June, 1907.

THE TOWN OF FORSYTH.
By D. J. MURI,
Act. Mayor.
Attest: S. H. ERWIN,
Town Clerk.

[Endorsed]: Title of Court and Cause. Complaint. Filed April 15, 1911. Geo. W. Sproule, Clerk. [15]

Thereafter, on April 15, 1911, summons was duly issued as follows, to wit: [16]

[Summons.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting: to the Above-named Defendant, The City of Forsyth, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 15th day of April, in the year of our Lord one thousand nine hundred and eleven, and of our Independence the 135th.

[Seal] GEO. W. SPROULE,
Clerk.

By ————————,
Deputy Clerk. [17]

Robt. J. Guy, being first duly sworn, says, that I received the within summons on the 28th day of April, 1911, and personally served the same on the 29th day of April, 1911, on said defendant, the City of Forsyth, in the county of Rosebud, State of Montana, by the Mayor thereof, by delivering to, and leaving with each of ..... said defendant named therein personally, at the City of Forsyth, County of Rosebud, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by George W. Sproule, Clerk of said court attached thereto, that affiant is not a party to, nor interested in said action.

Affiant further states that he is now, and at all the times herein mentioned has been a citizen of the United States, and of the State of Montana, and over the age of 18 years.

Dated this 29th day of April, 1911.

ROBT. J. GUY.

Subscribed and sworn to before me this 29th day of April, 1911.

[Seal] HENRY V. BEEMAN,
Notary Public for the State of Montana, Residing at Forsyth, Montana.

My commission expires April 4, 1913.

[Endorsed]: No. 1055. U. S. Circuit Court, 9th Circuit, District of Montana. E. W. Crellin et al., vs. The City of Forsyth. Summons. Filed May 15th, 1911. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. [18]

On motion of counsel for plaintiffs, permission is hereby granted that R. J. Guy may serve the within

summons, and he is hereby specially authorized by the Court to make service of process.

FRANK S. DIETRICH,
Judge.

Thereafter, on May 16, 1911, demurrer was filed herein as follows, to wit:

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendant.

Demurrer.

Now comes the defendant and demurs to the complaint of the plaintiff herein and for cause of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action.

F. V. H. COLLINS, and
GUNN & HALL,
Attorneys for Defendant.

Service accepted May 16, 1911.
Filed May 16, 1911.

GEO. W. SPROULE,
Clerk. [19]

And thereafter, on January 8, 1912, an order was entered overruling demurrer herein, as follows, to wit:

[Order Overruling Demurrer.]

In the District Court of the United States, in and for the District of Montana.

No. 1055.

E. W. CRELLIN et al.

vs.

CITY OF FORSYTH.

This cause, heretofore submitted upon demurrer, came on at this time for the judgment and decision of the Court, and after due consideration, it is ordered that said demurrer be and hereby is overruled, and defendant granted until February 1, 1912, to answer.

Entered, in open court, January 8, 1912.

GEO. W. SPROULE,
Clerk. [20]

Thereafter, on Feb. 27, 1912, answer was filed herein as follows, to wit: [21]

In the District Court of the United States, for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana. Formerly the Town of Forsyth,

Defendant.

Answer.

Now comes the defendant and for answer to the complaint herein:

I.

Admits the allegations of paragraphs I, II, III and IV of said complaint, except the allegation of paragraph IV that plaintiffs "duly performed all the terms, stipulations and conditions of said contract, plans, specifications and drawings, on their part to be performed, and that said water works, system and plant were fully completed by plaintiffs, and turned over to the defendant and duly accepted by the said defendant.

II.

Admits that during the progress and construction of said water plant various estimates were made of work done and material furnished which were presented to this defendant and that certain payments were made to said plaintiffs. Admits that said waterworks and system were turned over to defendant on or [22] about the 30th day of April, 1908, and that since said date this defendant has had the sole and exclusive possession and control of and has used the same for the purpose intended.

III.

Admits the allegations of paragraph VIII and IX of said complaint and alleges that the report of the committee on fire, light and water recommended that

the said final estimate be allowed as follows:

Total of final estimate as filed.....			$38,827.76.
DEDUCTIONS.			
Specials.. ....Item	5	$ 28.49	
Valve.... .... "	7	35.00	
10% charged ..... "	16	35.31	
Check Valves ..... "	20	12.53	
Seepage well ..... "	26	81.19	
Cement .... "	32	311.50	
Gravel .... "	33	225.00	
Reservoir 100.00			
White washing..		15.00	
Rods on pumping engine....		37.25	
Freight on Rods "		4.00	
Steam Gauge.....		8.00	$ 893.27
Balance.....			$37,934.49
Wheel Barrow...			3.00
Total.....			$37,937.49
Less previous payments.....			$31,460.44
Balance.....			$ 6,477.05
Less Force Account.....			$ 551.45
Balance.....			$ 5,925.60
Less error in addition.....			1.00
Balance			$ 5,924.60

That the said committee also at the same meeting of the City Council held on May 7, 1908, made a further and additional report and recommendation as follows:

"To the Honorable Mayor and Members of the Town Council, of the Town of Forsyth.

Gentlemen: **[23]**

We, the Committee on fire, light and water, to whom were submitted the final estimate of the Des Moines Bridge and Iron Company for water works construction, do hereby respectfully submit the following report:

The contract entered into between the Town in pursuance of Ordinance 69 contains among other things the following provision:

> 'It is also agreed that if the work herein provided for be not completed by the 30th day of November, A. D. 1907, the Contractor shall be liable for and shall pay to the Town the sum of Ten and no/100—($10.00)—Dollars, per day, for each and every day thereafter until the full completion of said work, which said sum is mutually agreed upon hereby as the liquidated damage which said Town shall sustain in event of the non-completion of said work, however, it is agreed that the payment thereof shall not be enforced by said Town against the Contractor upon proof satisfactory to the Town being furnished by the Contractor showing conclusively that the delay in completion of said work was caused by circumstances over which the Contractor has no control.'

We beg to report that the first permission to make any use of the Water Works System occurred by action of the Council April 3d, 1908, and call attention to the fact that the plant was not then com-

plete and that computing the time from the limit of the contract, to wit: November 30th, 1907, to April 3d, 1908, 125 days' penalty had accrued and we recommend that after the allowance of the final estimate in accordance with our previous report there be withheld from the payment thereof the sum of $1250.00 penalty or liquidated damages which the town is entitled to under the contract provision above set forth.

This recommendation is made because of the fact that the town during all of this time has been deprived of the benefit of this Water Works System which it had practically paid for and we find from examination that the actual revenue which [24] would have been derived from water rentals during this period would have amounted to the sum mentioned, to say nothing of the damage, inconvenience and expense resulting from the failure of the Contractor to complete the system.

Our investigation has impelled the conclusion in the minds of your committee that no excuse such as is contemplated by the provision of the contract quoted above can be offered by the contractor, inasmuch as the construction work was not complete until after the date mentioned and the Water Works System would not have been available for use until the construction work was complete and its completion was not delayed by circumstances over which the contractor had no control.

Although the conclusions of the committee are, as stated above, yet if the contractor elect so to do, we recommend that a day certain be fixed by the

Council on which the contractor may submit proofs to show that the delay complained of was due to circumstances over which the Contractor had no control.

Respectfully submitted."

That such report was adopted by the City Council of this defendant.

IV.

Denies that this defendant, acting by or through its City Council, or otherwise, duly or at all accepted or considered said final estimate, account and claim as having been, properly or otherwise, presented to the City Council except as hereinbefore alleged.

V.

Denies each and every allegation of said complaint not herein specifically admitted or denied. **[25]**

And for answer to this complaint this defendant alleges:

That the work provided for in said contract was not completed until the 3d day of April, 1908, or for a period of 125 days after the same should have been completed according to the terms and provisions of said contract and no satisfactory proof was furnished showing that the delay was caused by circumstances over which the contractor or the plaintiffs had no control, but as a matter of fact said delay was occasioned by the failure and neglect of the plaintiffs to exercise ordinary or any diligence in the furnishing of the material and the performance of the work provided for in said contract. That according to the terms and provisions of said contract this defendant is entitled to a de-

duction and allowance of $1250.00 on account of said delay. That the said plaintiffs submitted and presented to the City Council of this defendant certain reasons for said delay which were duly considered by said City Council and held and decided to be insufficient, and said City Council decided that no satisfactory proof that such delay had been caused by circumstances over which the plaintiffs had no control had been furnished.

And for further answer to said complaint defendant alleges:

That there never has been presented to the City Council of this defendant by said plaintiffs, or either of them, or anyone for them, or either of them, any account or demand against this defendant for the amount of said alleged final estimate, or any part thereof, or for the amounts sought to be recovered in this action, or any part thereof, accompanied by an affidavit of the plaintiffs, or either of them, or by any agent for them, or either of them, or any affidavit stating **[26]** the same to be a true and correct account against this defendant for the full amount sought to be recovered in this action, or any amount, or containing any statement whatever, but on the contrary the only account or demand or claim for the amount of said alleged final estimate sought to be recovered in this action ever presented to the City Council is the itemized statement in writing quoted and made a part of paragraph VIII of said complaint, which said itemized statement was not accompanied by any affidavit.

And for further answer to said complaint this defendant alleges:

That the cause of action stated in said complaint is barred by the provisions of section 3288 of the Revised Codes of Montana.

WHEREFORE, defendant having fully answered, prays to be hence dismissed with its just costs.

And for further answer to said complaint and by way of counterclaim this defendant alleges:

1. That the plaintiffs are and were at all the times herein mentioned copartners doing business under the firm name and style of Des Moines Bridge and Iron Company.

2. That this defendant is a municipal corporation incorporated and existing under and by virtue of the laws of the state of Montana.

3. That heretofore and on or about the 25th day of April, 1908, there was paid to said plaintiffs by the city treasurer of this defendant out of the funds and money of this defendant in the possession of said city treasurer the sum of $2831.01.

4. That no account or demand against this defendant for **[27]** the said sum of $2831.01 so paid, or any part thereof accompanied by an affidavit of the plaintiffs, or either of them, or of any agent of the plaintiffs, or either of them, or by any affidavit, was ever presented to the City Council of this defendant.

5. That the amount so paid to said plaintiffs as aforesaid was paid and received on account of material claimed to have been furnished and labor claimed to have been performed by said plaintiffs in carrying out and complying with said contract mentioned in the complaint in this action, a copy

of which is made a part of said complaint as Exhibit "A."

6. That no part of the said $2831.01 so paid to and received by said plaintiffs has ever been repaid and the said plaintiffs are now indebted to this defendant for said sum.

WHEREFORE, defendant demands judgment against the plaintiffs for the sum of $2831.01, with interest thereon at the rate of eight per cent per annum from the 25th day of April, 1908.

And for further answer to said complaint and by way of counterclaim this defendant alleges:

1. That the plaintiffs are and were at all the times herein mentioned copartners doing business under the firm name and style of Des Moines Bridge and Iron Company.

2. That this defendant is a municipal corporation incorporated and existing under and by virtue of the laws of the State of Montana.

3. That heretofore and on or about the 22d day of May, 1908, there was paid to said plaintiffs by the city treasurer of this defendant out of the funds and money of this defendant in the possession of said city treasurer the sum of $3500.00. [28]

4. That no account or demand against this defendant for the said sum of $3500.00 so paid, or any part thereof, accompanied by an affidavit of the plaintiffs, or either of them, or of any agent of the plaintiffs, or either of them, or by any affidavit, was ever presented to the City Council of this defendant.

5. That the amount so paid to said plaintiffs as aforesaid was paid and received on account of ma-

terial claimed to have been furnished and labor claimed to have been performed by said plaintiffs in carrying out and complying with said contract mentioned in the complaint in this action, a copy of which is made a part of said complaint as Exhibit "A," and is the $3500.00 referred to and mentioned in paragraph X of the complaint as having been paid to said plaintiffs on the 22d day of May, 1908.

6. That no part of the said $3500.00 so paid to and received by said plaintiffs has ever been repaid and the said plaintiffs are now indebted to this defendant for said sum.

WHEREFORE, defendant demands judgment against the plaintiffs for the sum of $3500.00, with interest thereon at the rate of eight per cent per annum from the 22d day of May, 1908.

F. V. H. COLLINS,
GUNN, RASCH & HALL,
Attorneys for Defendant. **[29]**

State of Montana,
County of Lewis & Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the matters stated in said answer are true to the best of his knowledge, information and belief; that the reason he makes this verification is because there is no officer of the said defendant now in the county of Lewis and Clark wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 27 day of Feby., 1912.

W. W. PATTERSON,

Notary Public for the State of Montana, Residing at Helena, Montana.

My Commission Expires,

Service of the within Answer admitted and receipt of copy thereof acknowledged this —— day of February, A. D. 1912.

S. ————————,

Attorney for Pltffs.

Filed Feb. 27, 1912. Geo. W. Sproule, Clerk. **[30]**

Thereafter, on March 30, 1912, replication was filed herein as follows, to wit: **[31]**

In the District Court of the United States for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Replication.

Now come the above-named plaintiffs, and for reply to the answer herein:

I.

1. Concerning the allegations of paragraph III of said answer in reference to the alleged "further and additional report" of the Committee on Fire, Light and Water, and the alleged adoption thereof by the City Council of defendant, these plaintiffs have not any knowledge or information thereof sufficient to form a belief, and therefore deny the same.

2. Deny generally and specifically each and every allegation in the further and affirmative answer to the said complaint contained on pages 5 and 6 of said answer.

II.

And in reply to the first counterclaim of said defendants:

1. Admit the allegations contained in paragraphs I, II and III thereof; and also admit that no part of the said sum [32] of $2,831.01 has ever been repaid by plaintiffs to said defendant.

2. Deny generally and specifically each and every allegation in said first alleged counterclaim not hereinbefore specifically admitted or denied.

III.

And in reply to the second counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II and III of said second counterclaim; and also admit that no part of said sum of $3,500.00 has been repaid by these plaintiffs to defendant.

2. Deny generally and specifically each and every allegation in said second counterclaim not hereinbefore specifically admitted or denied.

WHEREFORE, having fully replied the plaintiffs pray for the relief demanded in their complaint herein.

J. B. CLAYBERG,
EDWARD HORSKY,
Attorneys for Plaintiffs. [33]

State of Montana,
County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing replication, and knows the contents thereof, and that the matters stated in said replication are true to his best knowledge, information and belief; that the reason he makes this verification is because of the absence of the said plaintiffs and each of them from the county of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 30th day of March, A. D. 1912.

[Seal] E. M. HALL,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires the 27th day of July, 1913.

Service accepted Mar. 30, 1912.

Filed Mar. 30, 1912. Geo. W. Sproule, Clerk. [34]

Thereafter, on January 22, 1913, amendment to complaint was filed herein as follows, to wit: [35]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Amendment to Complaint.

Now come the above-named plaintiffs, and by leave of Court first had and obtained, make and file this their amendment to the complaint herein, and plaintiffs complain and allege:

10½. That on or about the —— day of October, 1907, and on or about the —— day of November, 1907, and on or about the —— day of December, 1907, and on or about the —— day of January, 1908, and on or about the —— day of March, 1908, and on or about the —— day of May, 1908, the said plaintiffs presented to the Town Council of said Town of Forsyth, a claim or demand duly itemized, being monthly estimates, for the amounts of ten thousand four hundred and twenty dollars and eighty-three cents ($10,420.83), and eleven thousand eight hundred and forty-eight dollars and fifteen cents ($11,848.15),

and four thousand six hundred and ninety-four dollars and ten cents ($4,694.10), and two thousand five hundred and sixty dollars and forty-six cents ($2,560.46), and two thousand six hundred and sixty-five dollars and one cent ($2,665.01), and seven thousand three hundred and **[36]** seventy dollars and thirty-two cents ($7,370.32), respectively, for work, labor and materials pursuant to said contract for the preceding month, accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth; and that all of the said described claims, demands and estimates, with the exception of the last one thereof, were paid, and on which said last mentioned final claim, demand or estimate, there was paid, as hereinbefore alleged, the said sum of three thousand five hundred dollars ($3,500.00).

EDWARD HORSKY,
Attorney for Plaintiffs. **[37]**

State of Montana,
County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, on oath deposes and says that he is the attorney for the above-named plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss; that he has read the foregoing amendment to complaint, and knows the contents thereof, and that the matters stated therein are true to affiant's best knowledge, information and belief, and that affiant makes this affidavit because of the absence of said plaintiffs, E. W. Crellin, W. H. Jack-

son, and B. N. Moss from the County of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 22d day of January, 1913.

GEO. W. SPROULE,
Clerk.

Filed Jan. 22, 1913. Geo. W. Sproule, Clerk. [38]

Thereafter, on January 23, 1913, amended replication was filed herein as follows, to wit: [39]

In the District Court of the United States for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,
Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,
Defendant.

Amended Replication.

Now come the above-named plaintiffs, and by leave of Court first had and obtained, for their amended replication to the answer herein:

I.

1. Concerning the allegations of paragraph III of said answer, admit that the report of the Committee

on Fire, Light and Water recommended, among other things, the allowance of certain items, in part, and also certain deductions, but in that behalf allege that only a portion of said report is set forth in said answer, and that certain other items of plaintiffs' account and estimate then before the Council were in said report allowed as therein more fully set forth.

2. And with reference to the allegations of said answer on page 5 thereof, lines 1 to 20 thereof: Plaintiffs admit that the work provided for in said contract was not completed until the 3d day of April, 1908, but deny that no satisfactory proof was furnished by them that such delay was caused by circumstances over which the plaintiffs had no control, and also deny that they failed to exercise ordinary or any diligence in the performance of said work; and in that behalf allege that **[40]** said non-completion was occasioned by, and due to, certain acts of defendant, and its omission, failure, and neglect to perform certain acts on its part and by it to be done and performed, to wit: (a) that the plans and specifications were uncertain, indefinite, and ambiguous as to the locus of the collecting seepage, or filter, galleries, in that it could not be ascertained therefrom whether the same were to be underneath the water of the river,—or outside the water's edge but within bank or shore line and underneath the riverbed, and therefrom, on or about the 4th day of September, 1907, plaintiffs requested defendant to definitely locate said galleries, but the Town Council of defendant and its representatives were yet undecided in the matter and taking the matter under considera-

tion did not decide as between said points of location until on or about December 10, 1907, when and whereupon at a regular meeting of the Town Council as set forth in its official council minutes, action was finally taken in reference thereto, said minutes being as follows:

"It appearing to the satisfaction of the town council that the plans and specifications for the location of seepage galleries for the water works for the town of Forsyth are somewhat inadequate and indefinite, wherefore it was moved by Alderman Irwin, seconded by Blum, that the town council do now provide for the location of said seepage galleries 25′ distance from the center of the intake well, providing the contractors, the D. M. B. & I. Co. agree to locate the said seepage galleries as mentioned above without extra expense to the town of Forsyth, and Alderman Muri be hereby empowered and authorized in connection with the contractor to stake out and locate said seepage galleries as herein provided. Roll call:

"Alderman Irwin, yea;
" Blum, yea; [41]
Alderman Muri, yea;

and motion carried. Motion to adjourn carried."

And promptly thereupon plaintiffs agreed thereto and did without extra expense to defendant locate said galleries; and plaintiffs together with Alderman Muri did stake out and locate said seepage galleries pursuant to said action of the Council, and promptly thereafter plaintiffs prosecuted the work on said galleries with all practicable diligence and particularly considering causes over which they had no control,

and which had not existed during the months of September, October, and November, 1907, to wit: freezing weather, resultant ice gorges, and damning back of river waters therefrom and overflowing of the galleries and freezing conditions unique to the Yellowstone River; that during the fall season and prior to November 30, 1907, the said galleries could and would have been completed but for said acts of defendant, or at any other season except the freezing or winter season, could and would have been completed in about 60 days.

(b) And furthermore, that on or about the 25th day of September, 1907, work on the pump-house was delayed at defendant's request by the contemplated changes in the plans for said pump-house, as well as a different method or system of filtration, and in reference to the substitution whereof the Town Council was undecided and so notified plaintiffs, and thereupon submitted to plaintiffs a detailed drawing or plan for the same, prepared by its Consulting Engineer, the Iowa Engineering Works, and requested plaintiffs to and they did furnish defendant a written proposal for such changes, and thereafter on or about the 25th day of October, 1907, defendant finally decided not to make such changes, and that it would proceed according to its original plan and so notified plaintiffs, who thereupon promptly resumed work on said pump-house according to the original **[42]** plan and prosecuted its work with all practicable diligence.

(c) Admit that these plaintiffs submitted and presented to the Town Council of defendant certain

reasons for said delay, and that the same were held and deemed insufficient by said Council and by it decided that no satisfactory proof of such delay had been caused by circumstances over which plaintiffs had no control, but deny that said delay was occasioned by their failure or neglect to exercise ordinary or any diligence in the furnishing of material, and in that behalf, allege that plaintiffs used all practicable diligence to assemble the materials for said contract, and the same were assembled at Forsyth at the earliest practicable date after the date of said contract (May 25, 1907), taking into consideration the geographical location of the town, the distance from available and practicable supply points, the nature and character of the proposed undertaking and all things considered; and that by force of circumstances over which plaintiffs had no control, to wit, a strike long-continuing in the only factory manufacturing the Smith-Vaile pump, patented, and one of special design according to said contract (as distinguished from a pump kept in stock) plaintiffs could not procure such pump (though ordered for August 15, 1907) at any time prior to February 15, 1908, when the same was promptly installed and in successful operation on the —— day of February, 1907; and that repeatedly and from time to time plaintiffs in good faith offered and agreed, irrespective of cost, to furnish, prior to said November 30, 1907, a Worthington or Dean pump, or any other pump equal to said Smith-Vaile pump, pursuant to the pump specifications of said contract, but that defendant declined such offer, and notwithstanding such strike, so be-

yond its control, arbitrarily and capriciously refused to consider **[43]** the sworn proof of such fact made by the Smith-Vaile pump factory and submitted by plaintiffs to defendant's Town Council; and plaintiffs further aver that the clause in said contract requiring proof "conclusive" to the Town Council is illegal, null and void, in that it is contrary to public policy and an attempt to oust the courts of their jurisdiction in the premises.

(d) Deny that according to the terms or provisions of said contract, or otherwise, or at all, defendant was or is entitled to a deduction or allowance of $1,250.00, or any other sum, or at all, for or on account of such delay or otherwise or at all.

(e) And plaintiffs further allege that Section 2223 of the Civil Code of Montana, enacted by the Legislative Assembly of Montana in 1895, and ever since in full force and effect since July 1, 1895, and never repealed, and which was re-enacted by an Act of the Tenth Legislative Assembly of said State, approved March 13, 1907, as Section 5047 of the Revised Codes, provides as follows: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

(f) And by reason of the said foregoing facts, hereinbefore affirmatively alleged, plaintiffs were prevented from completing said work until said 3d day of April, 1908, and by reason whereof and defendant's subsequent conduct and actions in the premises prior to April 3, 1908, said defendant has no right, or if any it had, it thereby waived the same, as well as its power and right to claim the same,

and it should be and was and is estopped from claiming or to claim or assert the same, or for the nonperformance of the work or furnishing of material under said contract by said 30th day of November, 1907, or any other dates prior to the 3d day of April, 1908.

(g) Deny generally and specifically each and every allegation [44] in said portion of said answer not hereinbefore specifically admitted or denied.

II.

The reply to the "further answer," set forth on page 5 commencing on line 21, and ending on page 6, line 9, with reference to the presentation of an itemized, verified account or demand, plaintiffs deny generally and specifically each and every allegation therein contained.

III.

Deny that the cause of action stated in said complaint is barred by the provisions of Section 3288 of the Revised Codes of Montana.

IV.

And in reply to the first counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II, and III thereof; and also admit that no part of the said sum of $2,831.01 has ever been repaid by plaintiffs to said defendant.

2. Deny generally and specifically each and every allegation in said first alleged counterclaim not hereinbefore specifically admitted or denied.

V.

And in reply to the second counterclaim of said defendant:

1. Admit the allegations contained in paragraphs I, II, and III of said second counterclaim; and also admit that no part of said sum of $3,500.00 has been repaid by these plaintiffs to defendant.

2. Deny generally and specifically each and every allegation in said second counterclaim not hereinbefore specifically admitted or denied.

WHEREFORE, having fully replied the plaintiffs pray for [45] the relief demanded in their complaint herein.

EDWARD HORSKY,
Attorney for Plaintiffs.

State of Montana,
County of Lewis and Clark,—ss.

Edward Horsky, being first duly sworn, says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing amended replication, and knows the contents thereof, and that the matters stated in said amended replication are true to his best knowledge, information and belief; that the reason he makes this verification is because of the absence of the said plaintiffs and each of them from the said County of Lewis and Clark, wherein affiant resides.

EDWARD HORSKY.

Subscribed and sworn to before me this 23d day of January, 1913.

GEO. W. SPROULE,
Clerk.

Filed Jan. 23, 1913. Geo. W. Sproule, Clerk. [46]

Thereafter, on January 24, 1913, further answer and counterclaim of defendant was filed herein as follows, to wit: [47]

In the District Court of the United States for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Further Answer and Counterclaim.

And for further answer to said plaintiff's complaint, and by way of counterclaim, this defendant, by leave of Court first had and obtained, permitting an amendment to said defendant's answer, alleges:

1. That the said plaintiffs are, and were at all the times herein mentioned, copartners, doing business under the firm name and style of Des Moines Bridge & Iron Company.

2. That under said contract with said plaintiffs, said plaintiffs were required to construct and build said waterworks, but that on or about the 28th day of February, 1908, and before the work on said waterworks plant or system provided for in said contract, had been completed, said plaintiffs stopped work on said waterworks and system, and failed to

resume work on said system after notice from said defendant to said plaintiffs requiring them to do so; that on account of the failure on the part of said plaintiffs to complete said waterworks and system, and their failure to resume work thereon when notified to do so as aforesaid, the said city [48] was obliged to, and did, perform work and labor for the completion of said waterworks and system between the 15th day of March, 1908, and the 3d day of April, 1908, and paid and expended for work and labor and services so performed by it in the construction of said waterworks and system, the sum and amount of $551.45, no part or portion of which said amount has ever been repaid by said plaintiffs to said defendant.

WHEREFORE defendant prays judgment against said plaintiffs as an offset to said plaintiff's demand, if any it has, to the amount of said sum of $551.45.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

State of Montana,
County of Lewis and Clark,—ss.

D. J. Muri, being first duly sworn, deposes and says: That he is an officer of said defendant corporation, to wit, the mayor of said City of Forsyth, and makes this verification on behalf of said corporation; that he has read the foregoing amendment to the answer of said defendant, and knows the contents thereof, and that the same is true to the best of affiant's knowledge, information and belief.

D. J. MURI.

Subscribed and sworn to before me this 24th day of January, 1913.

[Seal] W. W. PATTERSON,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires May 6th, 1914.

Filed Jan. 24, 1913. Geo. W. Sproule, Clerk. **[49]**

Thereafter, on January 27, 1913, judgment was duly entered herein as follows, to wit: **[50]**

In the District Court of the United States for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners, Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Judgment.

This cause came on regularly for trial on the 22d day of January, 1913, Edward Horsky appearing as counsel for plaintiff, and Messrs. F. V. H. Collins and Gunn, Rasch & Hall for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the Court sitting without a jury, whereupon witnesses were examined on the part of the plaintiffs

and on the part of the defendant, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court finds in favor of the plaintiffs in the sum of two thousand three hundred and thirty-two and eighty-nine one-hundredths dollars ($2,332.89), and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said plaintiffs, E. W. Crellin, W. H. Jackson, and B. N. Moss, copartners, doing business under the firm name and style of the Des Moines Bridge & Iron Company, do have and recover of and from the said defendant, The City of Forsyth, an incorporated city of the third class of the State of Montana, formerly the town of Forsyth, the sum of two thousand three hundred and thirty-two and eighty-nine one-hundredths dollars ($2,332.89), together with interest thereon at the rate of eight (8) per cent **[51]** per annum, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $378.40 dollars.

Judgment entered January 27, 1913.

GEO. W. SPROULE,
Clerk.

Attest a true copy.

GEO. W. SPROULE,
Clerk.

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States

District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 27th day of January, A. D. 1913.

GEORGE W. SPROULE,
Clerk.

By ————————,
Deputy Clerk.

Filed Jan. 27, 1913. Geo. W. Sproule, Clerk. **[52]**

That on January 8, 1912, Memo Order Overruling Demurrer was made and filed herein as follows, to wit:

No. 1055.

E. W. CRELLIN et al.,
Plaintiffs,

vs.

THE CITY OF FORSYTH,
Defendant.

Memorandum Order [Overruling Demurrer, etc.].

The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes. The object of requiring presentation is evidently to notify the council of the specific account or demand so that it may have opportunity to consider and investigate, if it so desires, before taking action.

This rule pertains to the demand or account itself, that is to say, to the very substantial thing, rather

than to the form of the account or demand. Presentation therefore must be had as a condition precedent to the maintenance of an action.

But the provision which calls for the accompaniment of an affidavit relates to the manner in which the account or claim presented shall be supported. The verification required does not, however, affect the claim or account itself, nor is it a part thereof, for it has only to do with the writing which shall accompany the account or demand presented.

The fact then that there can be no waiver of the requirement for presentation does not lead to the conclusion that irregularities in the form of the claim presented or in the papers which accompany the claim presented, but which do not constitute the claim or **[53]** demand, cannot be waived.

It is plain that the reasons which control the necessity for the presentation of the claim do not apply with great cogency to the formal statement in support of the claim.

Presentation of the claim is the important thing, and while the formal verification ought to be had, it is not indispensable to the claim itself or to the valid presentation thereof; hence omission of such affidavit of verification is an irregularity which can be waived.

Believing that this construction of the statute is based upon a just and well founded distinction, it follows that the acts done by the city council as pleaded in the present instance constituted a waiver of verification.

The demurrer is overruled, and the defendant must answer by February 1st.

Dated January 8th, 1912.

Filed Jan. 8, 1912. [54]

Thereafter, on April 19, 1913, Bill of Exceptions was settled and allowed and filed herein, being as follows, to wit: [55]

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of the DES MOINES BRIDGE & IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above cause came on regularly for trial in said above-entitled court on the 22 day of January, 1913, before the Honorable George M. Bourquin, the Judge of said court, without a jury, a trial by jury having been expressly waived by the parties to said action, Mr. Edward Horsky appearing as counsel for the plaintiffs, and Messrs. F. V. H. Collins and Gunn, Rasch & Hall, appearing as counsel for the defendant.

And thereupon the following proceedings were had:

The defendant objected to the introduction of any evidence on the part of the plaintiffs in support of the allegations of the complaint, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, for the reason that it was not therein alleged that the said final estimate and demand, copy of which is attached to plaintiff's complaint, marked Exhibit "A," was accompanied by an affidavit by said plaintiffs or their agent, stating the same to be a true and correct account against the said defendant, for the full [56] amount for which the same was presented, as required by the provisions of Sections 3283 and 3288 of the Revised Codes of the State of Montana.

Whereupon counsel for plaintiffs asked leave to amend their complaint by adding thereto the following additional paragraph:

> "10½. That on or about the —— day of October, 1907, and on or about the —— day of November, 1907, and on or about the —— day of December, 1907, and on or about the —— day of January, 1908, and on or about the —— day of March, 1908, and on or about the —— day of May, 1908, the said plaintiffs presented to the Town Council of said Town of Forsyth, a claim or demand duly itemized, being monthly estimates, for the amounts of ten thousand four hundred and twenty dollars and eighty-three cents ($10,420.83), and eleven thousand eight hundred and forty-eight dollars and fifteen cents

($11,848.15), and four thousand six hundred and ninety-four dollars and ten cents ($4,694.10) and two thousand five hundred and sixty dollars and forty-six cents ($2,560.46), and two thousand six hundred and sixty-five dollars and one cent ($2,665.01), and seven thousand three hundred and seventy dollars and thirty-two cents ($7,370.32), respectively, for work, labor and materials pursuant to said contract for the preceding month, accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth; and that all of the said described claims, demands and estimates, with the exception of the last one thereof, were paid, and on which said [57] last mentioned final claim, demand or estimate, there was paid, as hereinbefore alleged, the said sum of three thousand five hundred dollars ($3,500.00)."

Which was granted by the Court.

And thereupon the following testimony, and none other was introduced, with reference to the allegations contained in said additional paragraphs 10½, and upon the issue whether a demand or account against said defendant, accompanied by an affidavit, as required by said Sections 3283 and 3288 of the Revised Codes of Montana, had been presented for allowance to said defendant, City of Forsyth:

Testimony.

[Testimony of George W. Farr, for Plaintiff.]

GEORGE W. FARR, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HORSKY.)

My name is George W. Farr; am a lawyer, and am practicing at Miles City, and have practiced law between sixteen and seventeen years. I was consulted as an attorney by the Des Moines Bridge & Iron Company, the plaintiff in this case, in reference to the controversy with the town of Forsyth, concerning the installation of the waterworks system there. That was in 1908. With reference to the final claim, or final estimate, we presented a statement, which Mr. Smith swore to, on behalf of the Des Moines Bridge & Iron Company, and it was afterwards filed with the city council of Forsyth. It was a detailed statement and itemized. As to the form of affidavit, I could not give you the words of the affidavit at all. It was an affidavit sworn to by Mr. Smith, that the items of the account were true and correct and wholly unpaid; now, whether those were the exact words used, I do not know. The itemized statement was based on the statute requiring presentation of claims, itemized, verified claims, and demands against towns and cities. As to who was present when I went before the town council at Forsyth, [58] Mr. Smith was present, and it was in May or June, 1908, that I and Mr. Smith prepared and presented this sworn, itemized claim to the City Council. I took up this matter personally

(Testimony of George W. Farr.)

in my capacity as an attorney when I was at Forsyth, before the town council. As to the result of our efforts before the council on behalf of the company with reference to the presentation of the claim and demand, it was made pretty clear that nothing could be accomplished with the city by any negotiations for payment. The only reasons assigned for nonpayment were delay and seepage galleries.

Cross-examination.

(By Mr. RASCH.)

I could not tell the exact day now, when, in 1908, I was first retained by the plaintiffs in this case to act for them as their attorney. I had not been called upon to give advice or render any service for plaintiffs before any differences had arisen between the plaintiffs and the City of Forsyth, with reference to this final estimate. I would say it was along in April or May, probably in April, 1908. It was after those differences had come up that Mr. Smith either wrote me or came down to see me. Mr. Smith, I recall, came down to see me, and the question came up as to the character of the claim he presented, and I advised him that I thought it was necessary for him to present an additional claim. It appeared that the claim that was originally presented was not sworn to, and I told him it would be necessary to file a sworn claim, and pursuant to that he either sent to me or brought down to me copies of the estimates or original claims, or whatever they were, he had originally filed. What I refer to is that. I learned from him, or by communication with the city clerk, or possibly from an

(Testimony of George W. Farr.)

examination of the records myself, that the claim or estimate he had filed had not been properly sworn to, as I recall it now, not sworn to at all, and I told him it was necessary for him to file a properly sworn claim, and advised him to make that claim covering everything. I undoubtedly [59] made a copy of the final estimate or account which I made and presented to the council, but I have no independent recollection of it. I must have done it. As to what became of it, I think I gave that to Mr. Smith. I think we presented this verified account to the City Council in person. We had a meeting with the City Council, Mr. Smith and I did, and I think it was at that time that the account was presented. But it might be that the statement was presented at that time. I do not know whether the verified statement and the communication setting forth reasons for delay were filed at the same time. It was filed about the same time, but whether exactly the same time, I could not say. I was personally present in Forsyth, and my recollection is that I personally presented and filed the claim to the City Council. I know that I was personally present at the meeting of the City Council, and I think it was at that time that the claim was presented. Understand me, I am not sure—I mean at that date; whether it was at the night of the meeting or whether it was possibly made during the day at the city clerk's office, I would not say. As to whether I have any positive recollection whether it was presented at all to anybody, I know it was brought up there and filed or sent up and filed. I would not say whether it was

(Testimony of George W. Farr.)

filed with the city clerk before the meeting of the Council, or at the time that the Council was in session. If it was filed with the city clerk, it would be filed in his office, not necessarily with him. I have no distinct recollection of going to Mr. Collins' office and filing the claim; I have a very distinct recollection of being at his office. I have a distinct recollection of being before the Council, and think that the claim was filed at that time. I would not swear to it. As to the members of the Council present at that time, I am positive as to three of them, Mr. Muri and Mr. Blum and Mr. Erwin; I am not positive as to any one else. I have no recollection whether the city clerk or city attorney, Mr. Collins was there. In regard to this matter, I think I was before the Council only once, and took up everything with the Council. As to the time when I was before the Council, it was in the latter part of May or the first of June. I could not give you the date [60] now. As to what the members of the Council said when I presented the account, when we had this meeting that I referred to, they turned it down, that is about the only way I could express the general results of the meeting. There was a great deal said along the whole line, but what was said in particular upon any particular subject, I would not state positively, except what I stated upon direct examination; that is, they made the claim for delay. That seemed to be their main contention. I have no recollection that there was any specific statement made with reference to the verified account that I filed there, not as to the account itself any more

(Testimony of George W. Farr.)

than a general statement of the balance due, etc. After I had been unsuccessful in getting the Council to accede to my demand, I filed a mechanic's lien, but I didn't know at that time that a mechanic's lien upon property of a municipal corporation was no good, under the decisions of the Supreme Court of Montana.

I filed on the law side of this court a complaint for the foreclosure of that mechanic's and materialman's lien, and the papers which you show me is the judgment-roll in that case, and the action was commenced, according to the filing mark, on August 22, 1908. The mechanic's lien was prepared by me and sworn to by me as the attorney for the plaintiffs some time in July, 1908. In the complaint I simply set out the account and the lien, and prosecuted the action upon the contract between the parties, and what was done under the contract, and the balance upon the contract, and some extra items, as I now recall it. Whether, as a matter of fact, it was on an open, unsettled account between the City and my clients, it was an unpaid transaction, yes, sir.

Q. Why was it, if you had taken the pains to familiarize yourself with the law requiring the *presentation the* verified claims, as required by the statute, that you prepared a mechanic's lien and brought an action to foreclose the mechanic's lien? [61]

A. I do not know. I undoubtedly knew at that time that this account had been presented and verified by the parties, under my directions and advice. Subsequently I filed an amended and supplemental

(Testimony of George W. Farr.)

bill in equity. As to whether in that supplemental bill in equity reference was made at all to the fact that an account verified by the statutes had been presented to the council, I do not know.

Redirect Examination.

(By Mr. HORSKY.)

Q. So that there may be no uncertainty, Mr. Farr, will you please explain to the Court whether it was either before the Town Council or before the Clerk's office that this sworn itemized claim was actually presented?

A. It must have been, Mr. Horsky. I have no independent recollection of the precise act of filing. I distinctly remember of drafting it. I distinctly remember of our being before the Town Council of Forsyth, and associating those different things together; it must have been at that time, but I do not want to state positively that it was. As to having an opportunity since I left the stand this morning to look up any trip in June which I took back east by which I could fix the day in which I was in Forsyth, sometime during the week of June 2d I left Miles City; that is, the same week in which June 2d would come. I left Miles City for the east, and was gone to the 22d of June. I would not give the exact dates, but I could not have returned but a few days before the 22d anyway.

Recross-examination.

(By Mr. RASCH.)

Whether I appeared before the Council prior to my departure for the east or after, if I appeared

(Testimony of George W. Farr.)

after, it was [62] after June 22d, it was either before June 2d or after June 22d. I am very positive it must have been before June 2d.

[Testimony of Henry W. Smith, for Plaintiffs.]

HENRY W. SMITH, a witness called and sworn on behalf of the plaintiffs, testified that he was in charge of the construction work for the plaintiffs, and had been in their employ for seventeen years. With reference to the presentation of the alleged verified claim, he testified as follows:

Direct Examination.

(By Mr. HORSKY.)

With reference to the matter of the presenting of a claim or final estimate to the Town Council of Forsyth, I have seen the one written in long-hand here and filed. In addition to this final estimate written out in long-hand by me, there was another claim or demand submitted and presented by me to the City Council. I have not a copy of that claim. I heard Mr. Farr state that he thought that he had given it to me; if he ever gave it to me, it was lost somewhere, we didn't find it. We made search for it; very diligent search. As to what I did in having prepared by Attorney Farr what might be termed a second or revised supplemental final sworn claim, after some unsuccessful demands to get a settlement with the Town of Forsyth, I took the matter up with Mr. Farr, and after some little time we agreed that he was to look after our interests there in that case. I don't remember how long that was, but some little time, and when we got down to business of looking after

(Testimony of Henry W. Smith.)

the case Mr. Farr asked me if I had filed an affidavit with my final report. I admitted I had not, and he said that it was necessary to do it. It was prepared by him and sworn to by me.

I was present at the Town Council meeting in May with [63] Mr. Farr; and as to whether I recall whether it was at the town clerk's office or before the Council meeting that this verified claim or demand was presented, my recollection is that we left it at the clerk's office, but I am not positive. It may have been before the Town Council, but I am not positive. I am positive as to the fact that it was one place or the other. There is no question of that feature of it in my mind. I know Mr. Collins. He was the town clerk at that time, I believe, or acted in that capacity, and I think he was in charge of his office. I am not positive whether he was there at the time, but I believe he was.

Cross-examination.

(My Mr. RASCH.)

The final estimate attached to plaintiffs' complaint is the one that I presented first. That is the only one I presented. As to whether I took the matter up with Mr. Farr personally, going to Miles City, or by correspondence, I believe I called him up once by phone and wrote him once. I was present when this verified account was made up subsequently. It was made up in Mr. Farr's office in Miles City, at the same time as the statement accounting for the delays. I have with me a true and exact copy of the final estimate; and after the papers were prepared I returned

(Testimony of Henry W. Smith.)

to Forsyth. I think the verified account and statement was left with Mr. Farr until it was finally filed with the City. I do not recollect definitely whether the two papers were filed at the same time, that is, the verified account and the statement containing the excuses for the delay. It was filed somewhere along about the second day of June or the latter part of May, and I think both Mr. Farr and myself attended to the filing of this verified account. As to whether I have any recollection as to its being filed when the City Council was in session, with the City Council or with the City Clerk, my memory is as near as I can tell, it was filed with the City Clerk, on the same day, but we met with the City Council in the evening. Mr. Farr was with me at the time before the City Council when the matter was taken up. I have no particular [64] recollection whether the account was there before the Council when the matter was discussed. This particular paper, the verified supplemental account, must have been before the Council at the time Mr. Farr and I discussed with the Council the basis of making a settlement.

Redirect Examination.

(By Mr. HORSKY.)

The City Council made no objection to the form of the claim that I know of, and I never heard of any prior to this suit.

[Testimony of E. H. Erwin, for Defendant.]

E. H. ERWIN, a witness called and sworn on behalf of defendant, testified that from 1906 until 1909 he was a member of the City Council of the City of Forsyth, and was chairman of the committee on fire, light and water.

Direct Examination.

(By Mr. RASCH.)

I remember the occasion of the final estimate of the contractor being submitted to the City Council. The paper which you show me, of which a copy is attached to the complaint, is the final estimate that was submitted. There was not, to my knowledge, at any time filed with the City Council or presented to the City Council any other account or statement for the amounts stated in the final estimate, and I did not learn that the final estimate or account which had been submitted was not accompanied by an affidavit or verified until action had been commenced against the City. The final estimate was referred by the Council to the fire, light and water committee, and I was the chairman of that committee. The other member of that committee was Mr. Blum. The City Council minutes of May 7, 1908, were read, showing that the final estimate of the Des Moines Bridge and Iron Company was allowed.

I was in the courtroom here this morning when Mr. Farr testified with reference to his appearing before the Council. Mr. Farr never appeared before the City Council of the Town or the City of Forsyth, as the representative or attorney of the contractor, the

(Testimony of E. H. Erwin.)

plaintiffs in this case, in my presence, [65] when I was present. There never was a time during these transactions relating to the final estimate when Mr. Smith and Mr. Farr appeared before the Council and discussed the matter of the adjustment of the account and the settlement of the account with the City Council.

Cross-examination.

(My Mr. HORSKY.)

The minutes of the Council meetings show that I was present at every Council meeting. There were no matters that were of importance that happened before the Council of which there was not a record kept. As to being positive, beyond any question, that Mr. Farr was never before the Town Council, yes, sir, I am absolutely positive, beyond any question, that he was never before the Town Council at any meeting I was present at. He did not appear at any meeting, formal or informal, where I met with the Council. I never was present with any other aldermen at any time in the month of May or June, 1908, at which Mr. Farr was present in Forsyth. As to whether I recall of any time in May or June, 1908, when Mr. Farr was in Forsyth at all, I think he was, but as to what, if anything, he had to do with the Town of Forsyth, as a municipal corporation, in so far as going before any aldermen was concerned, he did not have anything, so far as I know. I simply saw him in town, but I do not remember what month it was. Judging from memory, it was somewhere in the forepart of June. He could have been at the

(Testimony of E. H. Erwin.)

Clerk's Office and I did not see him. I saw him out on the street, and whether I saw him with Mr. Smith, if I did, I don't remember it.

[Testimony of D. J. Muri, for Defendant.]

D. J. Muri, a witness called and sworn on behalf of the defendant, testified that he had lived in Forsyth for about eighteen years; was clerk of the District Court, and had been connected with the city administration since the town was incorporated in the latter part of 1904; that he is now Mayor of the [66] city, and has been such for nearly four years, it being his second term; that he was a member of the City Council during the time of the construction of the waterworks, and was President of the Council up to May, 1908.

Direct Examination.

(By Mr. RASCH.)

I heard the testimony here of Mr. Farr with reference to his appearing before the Council and filing a verified claim and verified final estimate and taking the matter of the adjustment of the differences between the contractors and the City Council up with the Council.

Q. I will ask you, Mr. Muri, whether at any time from the 7th day of May on, when the committee had made its report upon the final estimate up until the matter was disposed of in June or July, whether Mr. Farr ever appeared before the City Council in connection with the matters before the Council relating to the water plant.

(Testimony of B. Blum.)

from the first of May until some time in July, 1908, and I was present at all of the meetings of the Council during that period. I heard the testimony here of Mr. Farr as to his appearing before the Council, but Mr. Farr never, to my knowledge, appeared before the Council with reference to the differences that existed between the Town or City of Forsyth and the contractors while the matter was under consideration.

[Testimony of F. V. H. Collins, for Defendant.]

F. V. H. Collins, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RASCH.)

I am an attorney, and have been such for twelve years; am residing at Forsyth, and have resided there for the past eight or nine years. I was City Clerk of the City of Forsyth from February, 1908, on.

I heard the testimony of Mr. Farr on the stand here, of his being at Forsyth some time between the 21st day of May and the early part of June, or perhaps some time after the 22d day of June, in which he, in company with Mr. Smith, filed with the Council or the City Clerk an amended or additional account, containing the final estimate verified and *accompany* by an [69] affidavit. Mr. Farr never filed any paper of any description with me, and neither did he present a paper of any description to the Council in my presence at any time.

Q. I will ask you, Mr. Collins, if you were present

(Testimony of F. V. H. Collins.)

at the Council meetings from the 21st day of May, when it appears that there was a Council meeting, up to the time that Mr. Farr states that he left Miles City, the early part of June, and after his return on the 22d day of June?

A. I was present at all the meetings of the Council held during that period.

There never was at any time subsequent to the 21st day of May, or before that time, any paper served upon me or filed with me by Mr. Smith or Mr. Farr in the nature of a verified account, demand or claim based upon a final estimate. The only papers filed with me by Mr. Smith, in connection with this work, was the pencil final estimate and typewritten request for the calling of a Council meeting, and accompanied with a typewritten statement of reasons for delay, followed then by the exhibit which you have just shown me, and these were the only papers filed in my office in connection with this matter. The minute book of the Council meetings shows that there were no Council meetings from the 21st day of May until the 18th day of June. There was also introduced in evidence by the plaintiffs during the trial five monthly estimates of plaintiffs under said contract, which were made and filed by them with defendant prior to the last or final estimate, and each of which estimates was paid as shown by the defendant's canceled checks, warrants or vouchers in evidence, amounting in the aggregate to $34,960.44.

No cross-examination.

And thereupon, after the conclusion of the evi-

dence, the court rendered its decision, and with reference to the issue as to the presentation of the plaintiff's claim, based upon its final estimate, and the necessity of such presentation being accompanied by an affidavit, as required by Sections *382* to 3288 of the Revised Codes of the State of Montana, and upon the question whether the plaintiffs had sustained the burden of proof upon them to show that such presentation had [70] been made, the Court said, found and held as follows:

"I am inclined to dispose of this case now, and if you desire to make any arguments I will hear them now. I will say frankly, to commence with, it seems to me that the plaintiffs are entitled to recover, and the question is only how much, under this contract and these specifications. The case, as it appears to me, is one which has been tried in disregard to the pleadings, and the Court will consider the pleadings on both sides virtually amended so far as is necessary to conform to the proof. That is to say, this complaint seems to be a sort of a composite, a preceeding on the contract and on an approved claim. Of course, the claim after a fashion, was approved, but was approved with setoff. Now with reference to the statements, I am satisfied that the law would never hold that the plaintiffs must make the affidavits to these statements and estimates, when the city passed upon the accounts and approved them with certain deductions, regardless of the affidavit. That affidavit was waived by the consideration of these claims by the city. Suppose we should take a case where the plaintiff had carried the estimates to

the City Treasurer and had been paid the money on the estimates and that no criticism of that method had been offered. Certainly, if he were sued, he could have set up the fact that the money was paid. This final estimate, when it was finally submitted to the Council and was passed on and considered by the Council, took away from the Court the necessity of determining whether the plaintiff, through Mr. Farr and Mr. Smith, did file a claim verified with the City Clerk or with the Council. I will say again that there the burden of proof will be upon the plaintiff and without impeaching the good faith of either side, the Court believes that one side is mistaken but anyhow, the burden is not sustained. However, under the position taken by the Court, it is not material. The city approved this claim with certain deductions, and, of course, the question then comes what deductions the city was entitled to make." (The Court then took up the matter of deductions.)

To which ruling of the Court, in holding that plaintiffs were entitled to recover, notwithstanding their failure to prove that a claim had been presented to the City Council of the City of Forsyth, accompanied by an affidavit, as required by the provisions of Sections 3283 and 3288 of the Revised Codes of Montana, the defendant then and there duly excepted.

And thereupon judgment was entered in favor of plaintiffs and against the defendant for the sum of $2332.89, together with their costs and disbursements, amounting to the sum of $378.40. [71]

And thereupon the Court made an order granting the defendant sixty days from and after the 25th day

of January, 1913, within which to prepare and serve its bill of exceptions.

And now comes the said defendant, the City of Forsyth, and presents this, its proposed bill of exceptions in said cause, and prays that the same may be approved, settled and allowed by the Court, as provided by law.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Due service of the foregoing proposed bill of exceptions of the defendant, the City of Forsyth, is hereby acknowledged and receipt of a copy thereof accepted and admitted this 24th day of March, 1913.

EDWARD HORSKY,
Attorney for Plaintiffs.

[Stipulation as to Bill of Exceptions.]

It is hereby stipulated and agreed by and between the parties to said above-entitled cause that the foregoing proposed bill of exceptions is a full, true and correct bill of exceptions as to the proceedings had, and the evidence adduced, with reference to the issue in said cause as to whether a verified account or demand was presented to the City Council of the City of Forsyth, as required by the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, and may be approved, settled and allowed by the Court, as provided by law.

Dated this 17th day of April, 1913.

EDWARD HORSKY,
Attorney for Plaintiffs.
F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant. [72]

Order Settling, Allowing and Approving Bill of Exceptions.

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the District Court of the United States, for the District of Montana, before whom the foregoing entitled cause was tried, do hereby certify that the foregoing is a full, true, complete and correct bill of exceptions in said action, and that the same contains all the proceedings had, and all the evidence adduced, at the trial of said cause with reference to the issue as to whether a verified account, claim or demand was presented by the plaintiffs to the defendant, in accordance with the provisions of Section 3283 and Section 3288 of the Revised Codes of the State of Montana, and the same is now by me hereby settled, allowed and approved as a true and correct bill of exceptions in said action.

Dated this 19 day of April, 1913.

GEO. M. BOURQUIN,
District Judge.

Filed April 19, 1913. Geo. W. Sproule, Clerk. [73]

Thereafter, on June 20, 1913, Assignment of Errors was filed herein as follows, to wit: [74]

[Assignment of Errors.]

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLEN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE AND IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendant.

Now comes the defendant, the City of Forsyth, in said above-entitled cause, and files the following assignment of errors, upon which it will rely upon the prosecution of the writ of error issued in its behalf in the above-entitled cause:

I.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the City Council of the City of Forsyth had the right and authority to waive compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of the State of Montana, requiring that all accounts and demands against a city or town, and presented to the City Council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account

against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented. [75]

II.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the City Council of the defendant, the City of Forsyth, had waived compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, requiring that all accounts and demands against a city or town, and presented to the City Council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

III.

The District Court of the United States, in and for the District of Montana, erred in rendering judgment in said cause, and that said judgment is contrary to law and the facts, as found by the Court.

WHEREFORE, the said defendant and plaintiff in error prays that the said judgment of the said District Court of the United States, in and for the District of Montana, be reversed.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant.

Filed June 20, 1913. Geo. W. Sproule, Clerk. [76]

Thereafter, on June 20, 1913, Petition for Writ of Error and Order Allowing Same were filed herein as follows, to wit: **[77]**

In the District Court of the United States, in and for the District of Montana.

E. W. CRELLEN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE AND IRON COMPANY,

Plaintiffs,

vs.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, Formerly the Town of Forsyth,

Defendants.

Petition for a Writ of Error and Supersedeas of the Defendant, The City of Forsyth.

The City of Forsyth, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered in said cause on the 27th day of January, 1913, for the sum of $2332.89, and the further sum of $348.40 costs, comes now, by F. V. H. Collins and Gunn, Rasch & Hall, its attorneys, and petitions the Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that

upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray.

F. V. H. COLLINS and
GUNN, RASCH & HALL,
Attorneys for Defendant. [78]

[Order Allowing Writ of Error and Fixing Amount of Bond Thereon.]

Upon motion of Gunn, Rasch & Hall, attorneys for the defendant, the City of Forsyth, the foregoing petition for a writ of error is hereby granted, and it is ordered that a writ of error be, and hereby is, allowed, to have reviewed, in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein on the 27th day of January, 1913, and that the amount of bond on said writ of error be, and hereby is, fixed at Thirty-five Hundred Dollars.

GEO. M. BOURQUIN,
Judge.

Filed June 20, 1913. Geo. W. Sproule, Clerk. [79]

Thereafter, on July 8, 1913, Bond on Writ of Error was approved and filed herein, being as follows, to wit:

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, the City of Forsyth, as principal, and the

National Surety Company, a corporation organized and existing under the laws of the State of New York, and duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of Des Moines Bridge & Iron Company, in the full and just sum of Three Thousand Five Hundred Dollars ($3,500.00), to be paid to them, their attorneys, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of July, A. D. 1913.

Whereas, lately at a session of the District Court of the United States in and for the District of Montana, in a suit pending in said court between E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge & Iron Company, plaintiff, and the City of Forsyth, defendant, a final judgment was rendered against the said defendant, and the said City of Forsyth, defendant, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said E. W. Crellin, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge & Iron Company, is about to be issued, citing and admonishing them to be and appear at the United States Circuit [80] Court of Appeals for the Ninth Circuit, to be holden at San

Francisco, California:

Now, therefore, the condition of the above obligation is such that if the said The City of Forsyth shall prosecute its writ of error to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the said The City of Forsyth has caused these presents to be executed by its Mayor and its corporate seal to be affixed, and the said National Surety Company has caused these presents to be executed by its attorney in fact thereunto duly authorized and its corporate seal to be affixed hereto on this 5th day of July, A. D. 1913.

THE CITY OF FORSYTH,
By HARRY J. HURNE, Mayor.
F. V. H. COLLINS,
City Clerk.

[Seal] NATIONAL SURETY COMPANY,
[Seal] By W. K. ARMSTRONG,
Its Attorney in Fact Thereunto Duly Authorized.

The foregoing bond is hereby approved.

GEO. M. BOURQUIN,
Judge.

Filed July 8th, 1913. Geo. W. Sproule, Clerk.

[81]

Thereafter, on July 8, 1913, writ of error was duly issued herein, which writ of error is hereto attached and is in the words and figures following, to wit: [82]

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable, the Judge of the District Court of the United States, in and for the District of Montana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, and between the City of Forsyth, an incorporated city of the third class of the State of Montana, plaintiff in error, and E. W. Crellen, W. H. Jackson and B. N. Moss, copartners doing business under the firm name and style of the Des Moines Bridge and Iron Company, defendants in error, a manifest error hath happened, to the great damage of the said City of Forsyth, the plaintiff in error, as by their complaint appears.

We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the

7th day of August, 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, [83] the 8th day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States, in and for the District of Montana.

Allowed by:

GEO. M. BOURQUIN,
District Judge.

Service of the within writ of error, and receipt of copy thereof, is hereby acknowledged, this 8th day of July, 1913, without waiver of objections or right to object.

EDWARD HORSKY,
Attorney for Defendants in Error.

Answer of Court to Writ of Error.

The answer of the Honorable the District Judge of the United States for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals for the Ninth Circuit, at the day and place within contained, in a cer-

tain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk. [84]

[Endorsed]: No. 1055. United States District Court, District of Montana. E. W. Crellen et al., Defendants in Error, vs. The City of Forsyth, Plaintiff in Error. Writ of Error. Filed and Entered Jul. 8, 1913. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. [85]

Thereafter, on July 8th, 1913, a Citation was duly issued herein, which Citation is hereto attached, and is in the words and figures following, to wit: [86]

Citation [on Writ of Error (Original).]

The President of the United States to E. W. Crellen, W. H. Jackson and B. N. Moss, Copartners Doing Business Under the Firm Name and Style of Des Moines Bridge and Iron Company, and Edward Horsky, Esq., Their Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error *file* in the clerk's office of the District Court of the United States, in and for the District of Montana, wherein the City of Forsyth is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error

mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 8th day of July, A. D. 1913, and of the Independence of the United States the one hundred and thirty-seventh.

GEO. M. BOURQUIN,
United States District Judge.

Service of the foregoing citation received and copy thereof admitted this 8th day of July, A. D. 1913, without waiver of objections or right to object.

EDWARD HORSKY,
Attorney for Defendant in Error. **[87]**

[Endorsed]: No. 1055. United States District Court, District of Montana. E. W. Crellin et al., Defendants in Error, vs. The City of Forsyth, Plaintiff in Error. Citation. Filed and Entered Jul. 8, 1913. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. **[88]**

Certificate of Clerk U. S. District Court to Record, etc.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 89 pages, numbered consecutively from 1 to 89 inclusive, is a true and correct transcript of the pleadings,

process, records, orders and judgment, and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to sixteen 20/100 Dollars, and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 22nd day of July, 1913.

[Seal] GEO. W. SPROULE,
Clerk. [89]

[Endorsed]: No. 2290. United States Circuit Court of Appeals for the Ninth Circuit. The City of Forsyth, an Incorporated City of the Third Class of the State of Montana, formerly the Town of Forsyth, Plaintiff in Error, vs. E. W. Crellin, W. H. Jackson and B. N. Moss, Copartners Doing Business Under the Firm Name and Style of Des Moines Bridge & Iron Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, formerly the TOWN OF FORSYTH,

Plaintiff in Error.

vs.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE & IRON COMPANY,

Defendants in Error.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

The defendants in error, hereinafter, for convenience, called the plaintiffs, sued the plaintiff in error, hereinafter referred to as the defendant, in the court below for $3870.32, a balance claimed to be due them under a contract with the defendant

for the construction of a water-works system at Forsyth, Montana, (Tr. pp. 9 to16). The contract required payment for work done and material furnished to be made in monthly installments of eighty-five per cent. of the contract price of the completed work, (Tr. p. 13), and itemized accounts were presented from time to time as the work progressed and paid. On or about April 28, 1909, the plaintiffs presented to the city council of the defendant City for allowance their final estimate, account, and claim for $7370.32, (Tr. pp. 5 to 6), from which the City deducted $2695.72, which was the aggregate amount of various claims held by the City against the plaintiffs, approved the account for $4674.60, and made a payment thereon of $3500.00, (Tr. p. 7; Tr. pp. 22 to 23; Tr. p. 8). Upon the City's refusal to pay the plaintiff's claim in full, this action was instituted, terminating in the court below by a judgment rendered in favor of the plaintiffs for $2332.89 and costs, (Tr. pp. 45 to 47), and the defendant, claiming that error was committed in thus rendering judgment against it and in favor of the plaintiffs, brings the case here, by writ of error, for a review of the proceedings of the court below, (Tr. p. 78).

Section 3288 of the Revised Codes of Montana, (1907), hereinafter set out in full, provides that "all accounts and demands against a city or a town must be presented to the council duly itemized and accompanied by an affidavit by the party or his agent, stating the same to be a true and correct ac-

count against the city or town for the full amount for which the same is presented", and the city council, by the express terms of the statute in question, is without authority to allow or approve any account or demand not so presented. The complaint, as originally filed, failed to aver that the account upon which the action was based had been presented to the city council of the defendant City, accompanied by the statutory offidavit, but it was alleged that whatever objections, if any, there might have been to the form of said account, or to the presentation thereof, were waived, (Tr. p. 78). Having failed to allege that the claim or account was accompanied by the affidavit of its correctness as required by the statute, the defendant challenged the sufficiency of plaintiffs' complaint by general demurrer, (Tr. p. 19), but the demurrer was overruled (Tr. p. 20) by Judge Hunt, before whom it was argued, a memorandum setting forth the learned Judge's views upon the question presented was filed, in which it was held that the statutory requirements of verifying accounts and demands against cities and towns was not a matter of substance and could be waived, (Tr. pp. 47 to 49).

By way of affirmative defense, the defendant alleged in its answer to the complaint that no account or demand for any part of the amount sought to be recovered, accompanied by an affidavit, had ever been presented to the defendant. and that the action was barred by the provisions of said Sec-

tion 3288 of the Revised Codes of Montana, (Tr. pp. 26 to 27). But upon objection by defendant, interposed at the trial, to the introduction of any evidence on behalf of the plaintiffs in support of their complaint, on the ground that the same failed to state facts sufficient to constitute a cause of action, the plaintiffs sought, and obtained, leave to amend their complaint by adding thereto another paragraph, in which it was alleged that the statutory requirements had been complied with, and that the final account and claim against the City was presented to the council, accompanied by the statutory affidavit of its correctness, (Tr. pp. 33 to 34; Tr. pp. 50 to 51). The evidence adduced by the parties upon this issue is contained in the bill of exceptions, (Tr. pp. 52 to 67), and the court found that the plaintiffs had failed to sustain the burden of proof, which rested upon them, but held that the making of the affidavit was not essential and could be waived, and that it was waived by the council of the defendant City "when the City passed upon the accounts and approved them, with certain deductions regardless of the affidavit," (Tr. p. 68).

ASSIGNMENT OF ERRORS.

I.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the city council of the City of Forsyth had the right and authority to waive compliance with the provisions of Section 3283 and Section 3288

of the Revised Codes of the State of Montana, requiring that all accounts and demands against a city or town, and presented to the city council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

II.

The United States District Court, in and for the District of Montana, erred in holding and deciding that the city council of the defendant, the City of Forsyth, had waived compliance with the provisions of Section 3283 and Section 3288 of the Revised Codes of Montana, requiring that all accounts and demands against a ctiy or town, and presented to the city council, must be accompanied by an affidavit by the party, or his agent, stating the same to be a true and correct account against the city or town for which the same is presented, and that the same accrued as set forth, and that the council has no authority to allow any account or demand not so presented.

III.

The District Court of the United States, in and for the District of Montana, erred in rendering judgment in said cause, and that said judgment is contrary to law and the facts, as found by the Court. (Tr. pp. 72-73).

ARGUMENT.

The only question presented for the consideration of this court is whether a compliance with the provisions of Sections 3283 and 3288 of the Revised Codes of Montana, of 1907, requiring that all accounts and demands against cities and towns must be presented to the council, accompanied by an affidavit that the same are true and correct, may be dispensed with and waived. It will be observed that the two sections are identical down to the proviso in Section 3288, and the fact of the matter is, Section 3288 is Section 4812 of the Political Code of 1895, as the same was amended in 1903, (Montana Session Laws 1903, pp. 42 to 44), but for some reason Section 4812 of the Political Code appears in the Code of 1907 as Section 3283 in its original form and as it was before its amendment, and as Section 3288 in the form as amended. They are as follows:

"3283. (Sec. 4812). *Accounts must be itemized and sworn to.*—All accounts and demands against a city or town must be presented to the council, duly itemized and accompanied by an affidavit of the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to

allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon."

"3288. *Presentation of claims. Limitation of actions.*—All accounts and demands against a city or town must be presented to the council duly itemized and accompanied by an affidavit by the party or his agent, stating the same to be a true and correct account against the city or town for the full amount for which the same is presented, and that the same accrued as set forth, and with all necessary and proper vouchers, within one year from the date the same accrued; and any claim or demand not so presented within the time aforesaid is forever barred, and the council has no authority to allow any account or demand not so presented, nor must any action be maintained against the city or town for or on account of any demand or claim against the same, until such demand or claim has first been presented to the council for action thereon; provided however, that in case the total indebtedness of a city or town has reached three per centum of the total assessed valuation of the taxable property of such city or town, as ascertained by the last assessment for state and county taxes, it shall be lawful for, and such city or town is hereby authorized and empowered to conduct its affairs and business

on a cash basis as provided and contemplated by Section 3287 (1) of this act."

That these statutes are mandatory, and that compliance with their requirements is imperative, would hardly seem open to dispute. Judge Hunt so held as to the matter of presentation which, he says, "must be had as a condition precedent to the maintenance of an action," but that formal verification "is not indispensable to the claim itself or to a valid presentation thereof," (Tr. p. 48). The ruling made by the learned Judge is in direct opposition to the decisions of the Supreme Court of the State. In that connection, it should be said, however, that his attention was not called to the Montana cases when the demurrer was argued, and the conclusion which he reached was announced without being aware that the Supreme Court of the State had construed the statutes differently. As long ago as 1888 the Supreme Court of the Territory of Montana held, under a similar statute, that the itemizing and verifying of claims against municipalities was an indispensable prerequisite to their consideration and enforcement, and that a complaint which failed to allege "that the claim had been presented under oath," was fatally defective.

First National Bank v. Custer County, 7 Mont. 464.

Followed and affirmed in

Powder River Cattle Co. v. Custer County, 9 Mont. 145.

With reference to the particular sections of the

Code involved here, the State Supreme Court has had occasion to consider them in several cases, and in every instance has emphatically and unequivocally declared that they are mandatory requiring a strict compliance with their provisions. In Helena Water Works Co. v. City of Helena, 27 Mont. 205, the court had before it Section 4812 of the Political Code of 1895, and discussing its provisions, on page 208, said:

"The Code requires the city council to audit all claims and demands evidenced by itemized bills, *sworn to,* before any payment is made. A claim is presented, and after an auditing (that is a hearing) by the guardians of the city treasurer, not of other people's money, already assigned and set over to them, the account is allowed and ordered to be paid, if these guardians find that there is a debt against the city which is due and payable. *In no other way may a claim against a city be paid.* If the service and material men have no demands against the city, as contended by the city in the present case, and they do not claim that the city is indebted to them, then they may not file claims with the council for allowance and payment, and they can never get a cent. The city does not owe them anything, and the council has no business to hear them, or to order any warrant to issue for payment. If there be indebtedness, and the city is the one indebted, *then the claimants shall so swear,* and have their demands audited and established as part of the indebtedness of the city. Such is the

law, and such is the only conclusion to be drawn from the reading of the law. As we have said, *in no other way can a claim be established and paid, as the law now stands.* Expediency and emergencies arising out of extravagance or misfortune have, we think, led and forced city officials in Montana and elsewhere to adopt a plan such as suggested by counsel." (Italics ours).

The Chief Justice, in a concurring opinion, expressed himself to the same effect, as follows:

"Nor is there any escape from the conclusions of Mr. Justice Milburn as to the proper construction of the provisions of the statute touching the payment of claims against the municipality. It is the duty of the courts to declare the law as it is, and not *to exercise their ingenuity* in trying to devise means by which its *clear and explicit injunctions may be evaded.*" (Italics ours).

The same section was again considered, after it had been amended, and in the form in which it now appears in the Revised Codes as Section 3288, in Helena Water Works Co. v. City of Helena, 31 Mont. 242, and construed the same way, as follows:

"If a city has so wisely administered its financial affairs that it has not reached the constitutional limit of indebtedness, every expenditure of public money made by it must be made *under the very eyes of its inhabitant,* any one of whom is afforded an opportunity to inspect the items of the proposed expenditure and register his objection to such as may appear to him unwise or unnecessary; for in

such case every item of proposed expenditure must be *incorporated in an itemized bill, duly verified, filed with the city council, audited and allowed before payment can be ordered.*" (Italics ours).

And, again, in Palmer v. City of Helena, 40 Mont. 498, where the court said:

"Under these conditions the city was shorn of its power to exist as a municipality. It could not conduct its government without incurring debts. This it could not lawfully do, because it was prohibited from doing so by the Constitution; and it could not proceed upon the 'pay as you go' plan, *because not permitted to pay cash for services rendered or materials furnished, under the mandatory provisions of the statute supra.*" (Italics ours).

This construction of the statute, demanding a strict compliance with all of its requirements, is decisive here. For, as was said by this court in Flanigan v. Sierra County, 122 Fed., on page 26:

"These decisions are binding upon this court and will be followed, regardless of the decisions upon similar questions in other states."

There is, however, upon this question unanimity in the decisions of the courts in the different states. Thus, in Richardson v. City of Salem, (Oregon) 94 Pac. 34, which was the principal case and authority relied on by the defendant in the argument of the demurrer in the court below, the Supreme Court of Oregon, discussing the provisions of a similar section of the laws of that State, said:

"It is admitted by counsel for plaintiff that it

was necessary for him to present his claim to the city, which he did, *but without verification*. He insists that the itemizing or verification are not conditions precedent to the bringing of the action thereon, and are matters of defense, and, therefore, may be waived, which he claims was done in this case. If setting out the items of the account and verifying the same were only for the advice and guidance of the auditing officer, possibly he might waive them, as was held in Griswold v. City, 116 Mich. 401, 74 N. W. 663, and in Kennedy v. Mayor, 34 App. Div. 311, 54 N. Y. Sup. 261, but the language of the Salem charter is imperative: 'No claim against the city shall be paid until it is first itemized and verified.' These conditions are embodied in the charter for the protection of the taxpayers, as well as to provide notice and information to the auditing body; and the complaint must allege such facts as disclose that the city is in default. In Philomath v. Ingle, 41 Or. 289, 292, 68 Pac. 803, 804, Mr. Justice Moore says: 'The rule is well settled that 'where the presentation of a claim or the filing of a notice is required, such notice or presentation of claim is a condition precedent to the right to maintain an action against a municipal corporation, and must be averred by the plaintiff.' * * * * * * * Section 13 of the charter quoted above, not only prescribes the manner of the presentation of the claim to the auditing body, but prohibits payments thereof until these requirements are complied with. They constitute an inhibition, not only upon

the auditing body, but also upon the recorder and mayor in issuing the warrant. MacDonald v. Lane (Or.) 90 Pac. 381, is quite in point on this question."

This decision was subsequently followed and reaffirmed in Naylor v. McColloch, (Or.) 103 Pac., on page 71, where the court said:

"The above-cited provisions of the charter being in the interest of the general public, and a matter of positive law, it is difficult to see how the council could waive it; neither could they waive the fact that the claim was one they had no right to pay in any event, and their action in ordering it paid was a violation of the charter and void. Richardson v. Salem, 51 Or. 125, 94 Pac. 34, and cases there cited."

In Campbell v. Brackett, (Ind.) 90 N. E. 777, the statute prohibited the allowance by the city council of any claim or demand not properly itemized and verified, and a judgment for the recovery of money paid upon a claim not so presented in compliance with the statutory provisions was affirmed, the court saying:

"The board of trustees of an incorporated town has only statutory power and can perform its functions only in the statutory way. Zorn v. Warren-Scharf Co., 42 Ind. App. 213, 84 N. E. 509, and cases there cited; Moss v. Sugar Ridge Twp. 161 Ind. 417, 68 N. E. 896. Where the statute prescribes specifically how an act shall be performed by a statutory board, or prohibits its performance under certain conditions by such board, an act in direct violation thereof is absolutely void. McNay v.

Town, 41 Ind. App. 627, 84 N. E. 778, and cases cited. Here the statute above quoted prohibits in the most positive terms the allowance of a claim as appellant's claim was allowed. The act of allowance being void, all subsequent proceedings by which the money was placed in the hands of appellant were void. No title to the money received thereby passed to appellant, and it was subject to recovery wherever found. McNay v. Town, supra, and cases cited. And if, as is shown here, it was located in the bank and it could only be preserved and recovered by injunction proceedings, then such proceedings were proper."

Substantially to the same effect are:

Farley v. City of Lockport, 113 N. Y. Supp. 702;

Starling v. Bedford, (Ia.) 62 N. W. 674;

Walters v. City of Ottawa, (Ill.) 88 N. E. 651;

Purdy v. City of New York, 86 N. E. 560.

In Bingham County v. First National Bank, 122 Fed. 16, this court held that a provision of the Idaho statute requiring that county warrants "must distinctly specify the liability for which they are drawn and when it accrued," was mandatory, and that warrants which failed to specify when the claim accrued were void and would not support an action, nor could they be validated by any act of ratification of the county board. In discussing the statute, and its effect, the court said:

"It is thus seen that the state of Idaho has by statute conferred upon the board of commissioners of the county the power to, among other things, examine, settle, and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and has expressly declared that all such warrants 'must distinctly specify the liability for which they are drawn, and when it accrued.' *Is any court justified in treating such language as merely directory?* We think not. It is well settled that, if the statute under which a municipal corporation is organized and acts prescribes a particular mode in which the property of the corporation shall be disposed of, *that mode must be pursued.* Dillon on Municipal Corporations (4th Ed.) Sections 463, 578, and 536. The state of Idaho, as has been seen, authorized the board of commissioners of the defendant county to allow only legal claims against it, within which claims barred by its statute of limitations would not come. Carroll v. Siebenthaler, 37 Cal. 193. And it has been held that, even though the governing board of a county should allow illegal claims, it is the duty of the auditor to refuse to draw warrants therefor, and, if warrants are drawn, it is the duty of the treasurer to refuse to pay them. Linden v. Case, 46 Cal. 171; Merriam v. Board of Supervisors of Yuba County (Cal.) 14 Pac. 137; Trinity County v. McCammon, 25 Cal. 121.

The Bingham County case is approvingly cited, and the principle therein announced was adopted

and applied by the Supreme Court of Montana, in In re Farrel, 36 Mont. 254, a habeas corpus proceeding. The petitioner had been convicted of forgery for the issuing, as a deputy clerk of the District Court of Silver Bow County, Montana, of false and fraudulent juror's certificates. The statute required the clerk to give to each juror, when excused from further service, a certificate *"under seal,"* stating the name of the juror, the number of day's attendance, the number of miles traveled, etc. The seal, however, had not been affixed to any of the certificates so issued, and the court held that the statute was mandatory, and in the absence of the seal the certificate could "not be made the basis of legal liability against the county," hence, they were of no legal effect, "and therefore void."

The principle that there cannot be a waiver of the mandatory provisions of a statute is universally recognized by the decisions of all the courts. Nor was any rule to the contrary laid down by the Supreme Court of Michigan in the cases cited by the plaintiffs in support of the sufficiency of their complaint in the court below. In Foster v. Bellaire, 86 N. W. 383, the contention that the statute involved in that case was mandatory was denied, the court saying that "the precise question presented in this case was before the court in Griswold v. City of Luddington, 74 N. W. 663, and was decided against the contention of counsel for defendant." In the Griswold case the court held that "the com-

mon council might waive such defects, under certain circumstances," and cites Canfield v. City of Jackson, 70 N. W. 444, which is the authority upon which all subsequent decisions to that effect are based. But the statute considered by the court in the Canfield case, which is set out in the opinion of the court in that case, left it to the discretion of, and made it entirely optional with, the common council whether a claim presented against the municipality should be verified or not. The statute construed by the court in that case was as follows:

'The council shall audit and allow all legitimate claims against the city; *and when required by the common council every account shall be accompanied with an affidavit* of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; and that the sums charged therefor are reasonable and just, and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim." (Italics ours).

The Supreme Court of Montana, having by its decisions declared the sections of the Montana Code to be mandatory, these decisions, as was said by this Court in Flanigan vs. Sierra County, *supra,* are binding. The plaintiffs' failure to present their claim as required by the statute, and within the time limited for that purpose, precluded a recovery

and applied by the Supreme Court of Montana, in In re Farrel, 36 Mont. 254, a habeas corpus proceeding. The petitioner had been convicted of forgery for the issuing, as a deputy clerk of the District Court of Silver Bow County, Montana, of false and fraudulent juror's certificates. The statute required the clerk to give to each juror, when excused from further service, a certificate *"under seal,"* stating the name of the juror, the number of day's attendance, the number of miles traveled, etc. The seal, however, had not been affixed to any of the certificates so issued, and the court held that the statute was mandatory, and in the absence of the seal the certificate could "not be made the basis of legal liability against the county," hence, they were of no legal effect, "and therefore void."

The principle that there cannot be a waiver of the mandatory provisions of a statute is universally recognized by the decisions of all the courts. Nor was any rule to the contrary laid down by the Supreme Court of Michigan in the cases cited by the plaintiffs in support of the sufficiency of their complaint in the court below. In Foster v. Bellaire, 86 N. W. 383, the contention that the statute involved in that case was mandatory was denied, the court saying that "the precise question presented in this case was before the court in Griswold v. City of Luddington, 74 N. W. 663, and was decided against the contention of counsel for defendant." In the Griswold case the court held that "the com-

mon council might waive such defects, under certain circumstances," and cites Canfield v. City of Jackson, 70 N. W. 444, which is the authority upon which all subsequent decisions to that effect are based. But the statute considered by the court in the Canfield case, which is set out in the opinion of the court in that case, left it to the discretion of, and made it entirely optional with, the common council whether a claim presented against the municipality should be verified or not. The statute construed by the court in that case was as follows:

'The council shall audit and allow all legitimate claims against the city; *and when required by the common council every account shall be accompanied with an affidavit* of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city; and that the sums charged therefor are reasonable and just, and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim." (Italics ours).

The Supreme Court of Montana, having by its decisions declared the sections of the Montana Code to be mandatory, these decisions, as was said by this Court in Flanigan vs. Sierra County, *supra,* are binding. The plaintiffs' failure to present their claim as required by the statute, and within the time limited for that purpose, precluded a recovery

against the defendant City. It follows that the judgment in their favor was improperly rendered in the court below, and the same should be reversed.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, formerly the TOWN OF FORSYTH,

Plaintiff in Error,

vs.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Copartners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE & IRON COMPANY,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

SUPPLEMENTAL STATEMENT.

In the statement of the case by plaintiff in error, (Brief 4), reference is made to Judge Bourquin's findings and decision. (Tr. 68). The opinion is a terse, lucid exposition of the legal propositions involved herein.

To quote the Bill of Exceptions, (Tr. 68),—

"The Court *said, found* and *held* as follows:

"I am inclined to dispose of this case now, and if you desire to make any arguments I will hear them now. I will say frankly, to commence with, it seems to me that the plaintiffs are entitled to recover, and the question is only how much, under this contract and these specifications. The case, as it appears to me, is one which has been tried in disregard of the pleadings, and the Court will consider the pleadings on both sides virtually amended so far as is necessary to conform to the proof. That is to say, this complaint seems to be a sort of a composite, a proceeding on the contract and on an approved claim. Of course, the claim after fashion, was approved, but was approved with setoff. Now with reference to the statements, I am satisfied that the law would never hold that the plaintiffs must make the affidavits to these statements and estimates, when the city passed upon the accounts and approved them with certain deductions, regardless of the affidavit. That affidavit was waived by the consideration of these claims by the city. Suppose we should take a case where the plaintiff had carried the estimates to the City Treasurer and had been paid the money on the estimates and that no criticism of that method had been offered. Certainly, if he were sued, he could have set up the fact that the money was paid. This final estimate, when it was finally submitted to the Council and was passed on and considered by the Council, took

away from the Court the necessity of determining whether the plaintiff, through Mr. Farr and Mr. Smith, did file a claim verfied with the City Clerk or with the Council. I will say again that there the burden of proof will be upon the plaintiff and without impeaching the good faith of either side, the Court believes that one side is mistaken but anyhow, the burden is not sustained. However, under the position taken by the Court, it is not material. The city approved this claim with certain deductions, and, of course, the question then comes what deductions the city was entitled to make." (The Court then took up the matter of deductions.)"

It thus appears that the particular point upon which the city failed to sustain the burden of proof was that of the claim not being "verfied." (Tr. 69.) In all other particulars, there was a compliance with the statute. No question was or could be raised as to these facts: A claim or final estimate, itemized in detail, was properly presented within proper time, considered by the City Council; no *objection* made to the *form* of the claim; the claim was allowed in part and ordered paid in part,—to the extent of $3500.00, approximately one-half; and also that the *aldermen* did not even know until *after suit* was brought that there was any question about the claim being *verified* (Tr. 61, l. 15-19; Tr. 64, l. 1-5).

Moreover, under the contract the city had paid five monthly estimates prior to said last final esti-

mate, as shown by the defendant city's cancelled checks and warrants in evidence in the aggregate of $34,960.44 (Tr. 67); and the city accepted the water plant, after a test duly made in accordance with the provisions of the contract "to the satisfaction of the Town Council of said Town, and by its duly qualified engineer," (Tr. 14), and passed and accepted the final estimate, making a payment thereon.

Counsel claim (page 6 of Brief) that the only question presented is whether a compliance with sections 3283 and 3288 of the Montana Codes "may be dispensed with and waived."

A more accurate statement of the *concrete* question involved would be: Where a Montana city has entered into a valid contract for the installation of a water plant, which has been constructed by the contractor, tested and accepted by the city, and all monthly estimates, five in number, have been allowed and paid, and the sixth and final estimate has been presented to and approved by the city council with certain deductions, and approximately one-half of such final estimate is allowed, paid, and no objection whatever made to the form of such claim, which is properly itemized, presented within the proper time, and complies with the statute in all other respects, and the ground of partial disallowance is solely a dispute as to certain items therein and deductions for delays claimed by the city pursuant to the contract,—can the city, in a suit by

the contractor, avoid payment of the amount found due by the court, on the ground that such final estimate or claim was not "accompanied by an affidavit?"

ARGUMENT.

I.

Under the facts shown, it was not necessary for defendants in error to present any claim to the city council.

A brief reference to certain provisions of the contract seems to be important, and these are as follows, viz.:

"In consideration of the foregoing covenants and agreements herein set forth on the part of said contractor, to be done and performed, said town hereby agrees to well and truly pay to said contractor out of the funds hereinafter stated, and in the manner hereinafter set forth, for the construction of said water system, viz," Then follows an itemized statement giving the specific amounts to be paid for the different classes of work in the construction.

The contract further provided that the Council might require further work than as stated in the contract, such as a greater number of feet of pipe to be laid, etc., all of which were to be paid to the contractors at the actual cost thereof plus ten per cent. The contract then provided "and the said town further agrees that all payments for the work

under this contract shall be made in monthly installments of eighty-five per cent of the contract price on the completed work, being any materials built in place. The balance of the contract price herein provided for, to be paid to the contractor upon the completion and final test of said water works system, which *test* shall be to the *satisfaction of the town council,* and upon the *acceptance of said system by the town council* of said town, and by its duly qualified and acting engineer, which acceptance shall be within thirty days after the proper completion of said water works system in all respects as provided for by this contract, and that *such payments shall be made by warrants of said town drawn upon its water works fund by the order of the town council, and duly signed by its Mayor and Clerk.*"

It is undisputed that plaintiffs completed the work, that it was tested by the city and duly accepted as being complete, and that since the 30th of April, 1908, the City has had the sole and exclusive possession and control of the water works plant, and has used the same for the purpose intended; that plaintiffs presented a final estimate to the council, and that on May the 8th, 1908, said council accepted and allowed such final estimate, making a payment thereon.

Under the circumstances in this case, we submit that the statute relied upon by defendant has no application. The statute mentioned was evi-

dently enacted by the legislature for the protection of the City against exhorbitant bills for supplies furnished the City, or work and labor performed for it, *without any written* contract fixing the amount to be paid and the date of payment. It was also undoubtedly intended by this legislation to prevent friends of the members of the city council from unduly furnishing labor or supplies to the City at an exhorbitant price and having the same paid for without the proper investigation by the council as a body. As said by the Supreme Court of Montana, in the case of Dawes vs. City of Great Falls, 31 Mont. 9,—"It is apparent from these sections that the requirement that 'all accounts and demands' against the city should be submitted to the council, was for the purpose of allowing the City to audit such accounts and demands and direct their payment." The council represented and acting for the city, and for each and every resident and taxpayer thereof, had the question fully before them as to the cost and of payment for the construction and installment of a water plant, and in the making of a contract must have considered all questions which might possibly be involved in the consideration of an account presented under the section of the statute referred to. The City promises to pay at a certain time, and in a certain manner, the consideration expressed in the contract. Nothing was left for the council to do, save accept or reject the work, and if accepted, pay the consideration stated

in the contract. There was nothing from which it could be inferred that any person was obtaining money from the council on a claim which was not fully understood and honestly assumed by the City. It has always been held by the authorities uniformly, that no claim need be *presented* to the council for the salary of any employe of the City. The employment is a sufficient *presentation* to the council to fully satisfy the statute, and the statute does not apply.

Wynne vs. Butte, 45 Mont. 417, 123 Pac. 531;

See also,

State vs. Doggett, 28 Wash. 1, 68 Pac. 340.

II.

AFFIDAVIT NOT ESSENTIAL TO ENTITLE PLAINTIFF TO RECOVER. WAIVER.

On page 8 of the brief, it is said that the statutes are mandatory, and that compliance with their requirements is imperative.

Assuming for the purpose of the argument that such statutes are mandatory, nevertheless, there may be acts and conduct constituting a waiver, and estoppel may arise.

Upon the questions of verification not being indispensible to maintain suit, and that the acts pleaded and done constituted a waiver, Judge Hunt's opinion is both sound and logical, and applies with peculiar force to the case at bar. The decision (Tr. 48) is as follows:

"The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes. The object of requiring presentation is evidently to notify the council of the specific account or demand so that it may have opportunity to consider and investigate, if it so desires, before taking action.

"This rule pertains to the demand or account itself, that is to say, to the very substantial thing, rather than to the form of the account or demand. Presentation therefore must be had as a condition precedent to the maintenance of an action.

"But the provision which calls for the accompaniment of an affidavit relates to the manner in which the account or claim presented shall be supported. The verification required does not, however, affect the claim or account itself, nor is it a part thereof, for it has only to do with the writing which shall accompany the account or demand presented.

"The fact then that there can be no waiver of the requirement for presentation does not lead to the conclusion that irregularities in the form of the claim presented or in the papers which accompany the claim presented, but which do not constitute the claim or demand, cannot be waived.

"It is plain that the reasons which control the necessity for the presentation of the claim do not apply with great cogency to the formal statement in support of the claim.

"*Presentation* of the claim is the important thing, and while the formal verfication ought to be had, it is not indispensible to the claim itself or to the valid presentation thereof; hence omission of such affidavit of verification is an irregularity which can be waived.

"Believing that this construction of the statute is based upon a just and well founded distinction, it follows that the acts done by the city council as pleaded in the present instance constituted a waiver of verification."

It is claimed that the learned judge's attention was not called to the Montana cases when the demurrer was argued, and that he reached his conclusions without being aware that the Supreme Court of Montana had construed the statutes differently. This is indeed edifying. The learned judge was well aware of these decisions and certainly with a decision which he himself had rendered in the case of

State ex rel Kaiser Water Co. vs. City of Phillipsburg, 23 Mont. 16, 57 Pac. 405.

In Montana, mandamus had theretofore been held to be a proper remedy to enforce payment of a contract by a municipality.

State ex rel vs. Gt. Falls Water Co., 19 Mont. 518.

The Kaiser case was an application for writ of mandate to compel the auditing and allowance of the relator's monthly water bill under a contract,

and as here, was *partly* allowed and the balance *disallowed.* The petition alleged with reference to the presentation of the bill the following:

"And your petitioner further states that its said bill was 'duly verified' and presented to the said City council for allowance in the sum of ~~$157.95~~ 193.93, and that the same was approved and allowed by the said City Council in the sum of but $140.62."

But the complaint omitted to allege that the bill or claim was *itemized,* which, if counsel are correct, is just as essential as the afidavit; and yet a general demurrer to the complaint for insufficiency was overruled; the defendant elected to stand on its demurrer, judgment went for relator, and, on appeal, was affirmed.

How is the claim to be presented? To the *city council;* not to the *mayor,* the city auditor, to a chairman of some council committee, or to some other city functionary; but to the *city council.*

That is to say before any action can be commenced on any claim or demand, it must be *presented* to the *city council* within one year. In the case at bar, that was done; and the claim was also duly itemized. In order to entitle the party to bring an action upon the debt due him, it is not necessary that his claim must have been sworn to.

It may be assumed for the purpose of the argument and none other, that the *non-verification* or *non-itemization justifies* the council in disallowing

or refusing to order payment of the claim in that form; but the *non-verification* or *non-itemization* certainly does not invalidate the indebtedness itself, nor does the statute provide that because the claim was not verified or itemized, when presented, within one year, to the city council, therefore no action can be commenced because of it not being verified or itemized. The disallowance of the non-verified or non-itemized demand, leaves the claimant the choice of one or two alternatives; that of presenting a new or supplemental claim within the year, if he has been notified and has enough time left, or commencing suit in court, where he *must "verify"* the complaint.

In the case of Pearson vs. City of Seattle, 44 Pac. 884, it was held that an action may be maintained on a claim filed with the City Clerk and presented to the council, *not verified* as required by the charter, *where there is nothing in the charter forbidding an action to be maintained upon an unverified claim.* We submit this is a condition which presents itself in this case under that part of the statute referred to. There is nothing in the Montana statute prohibiting the bringing of a suit, except that it must appear that the account was presented to the City.

The questions raised by the plaintiff in error herein have frequently been before the courts for consideration, and the following cases sustain our position:

Wright vs. Village of Portland, 76 N. W. 141;
Griswold vs. City of Ludington, 74 N. W. 663;

man v. Ogden City, 33 Utah 196, 204; 93 Pac. 561.

W. 444;
W. 78;

Foster vs. Village of Bellair, 86 N. W. 383;
Moore vs. City of Detroit, 129 N. W. 715;
Lindley vs. City of Detroit, 90 N. W. 665;
Kriseler vs. LeValley, 81 N. W. 580;

Foster vs. Village of Bellair, Supra, was an action for injuries for defective sidewalk. It was conceded by plaintiff that the claim was *neither itemized* nor verified. The *council,* however, proceeded to *consider* the claim. The Supreme Court said, with reference to the itemization and verification of the claim''—''It is insisted by counsel that the requirements of the statute are mandatory and cannot be waived by the common council. The precise question presented in this case was before the court in Griswold vs. City of Ludington, 74 N. W. 663 and was decided against the contention of counsel for the defendant. See also Wright vs. Village of Portland, 76 N. W. 141.''

Moore vs. City of Detroit, Supra. This was an action brought by Moore and Moore against the City of Detroit for legal services performed for the Village of Fairview, which was assumed by the City of Detroit. The claims were *presented* to the City council for the City of Detroit, but not *verified.* The Court says: ''The record shows, however, that

both municipalities considered a claim, the defendant, the City of Detroit, heard testimony in the matter and the payment thereof was refused by both defendants. Apparently no objection was raised to the claim for this irregularity before the council committee. We think it has been waived. Griswold vs. City of Ludington, 74 N. W. 663; Wright vs. Village of Portland 76 N. W. 141; Foster vs. Village of Ballair, 86 N. W. 383; Lindley vs. City of Detroit, 90 N. W. 665. Informal notice seems to have been served on the City Council, which referred the claim to a committee, which proceeded to investigate it. The committee took testimony concerning the claim and by the report of the committee the claim was disallowed. The Court says: "The important question is that of waiver. It is based on the fact that the Council and City Attorney, through his subordinates, acted upon the claim as presented to the council, and gave plaintiff the right to suppose that they were willing to treat the notice as sufficient. We have often decided that the common council may waive the formalities of a notice. (Citing Cases.) Without intending to hold that the the City attorney may waive notice upon him and thereby bind the City, we have no hesitation in saying that the council may do so. Whether it has done so or not is usually a question of fact to be submitted to the jury, but the facts are undisputed in this case, and we think it was proper for the Circuit Judge to instruct the Jury that by re-

ferring the claim to its committee to investigate upon its merits and through the action of its committee in doing so, it waived further notice."

In the case of Kriseler vs. LeValley, 81 N. W. 580, the claim was *presented* to the common council of the Village of Vasser, as night watchman and deputy marshal for the month of April, 1899, amounting to $31.25. The Court said: "It is urged that the account presented was informal, and *not in compliance* with section 2745 Compiled Laws of 1897. The section in question is intended to protect the Village from suit without an opportunity previously ofefred to the Council to investigate the claim, and to do justice. *It is true the statute provides the claim shall be accompanied by an affidavit or certificate of an officer of the corporation.* Assuming that this provision was intended to apply to the account of the officer of the Village for a fixed salary, the *council* has a right to insist upon such certificate or affidavit as a condition to taking action on the claim, but it also has a right to *waive* the requirement. In this case the council saw fit to treat the claim as sufficient in form, and unanimously allowed the claim."

It seems that the statute of Michigan requires that claims presented to a vilage or city council for audit and allowance, mut be verified and itemized. This provision in that state applies as well to an account for damages for a tort of the City, as to claims and accounts arising on contracts. In the

case of Wright vs. Village of Portland, supra, an account for damages was presented, which was *not verified.* A committee of the council was appointed to investigate the claim, which caused a survey to be made for the purpose of ascertaining the amount of damages. The council thereafter referred the matter to its President to settle the claim, and at his request, plaintiff appeared before him and tried to make an adjustment. The only objection to the payment of the claim was the amount, and not because it was not verified as required by the statute. The Supreme Court, by Moore, Justice, held that by not objecting to the claim on account of its not being verified, the council waived such requirements, and says:

"We do not see how any question of public policy is involved here so as to affect the question of waiver. Had this claim been allowed and paid we do not think it could be said that an illegal claim, or one contrary to public policy, had been adjusted simply because the claim was not verified. This requirement of the statute is for the benefit of the Village, and is a matter which may be used by it by way of defense. The Court construed a similar statute several times. In Germaine vs. City of Muskegon, 105 Mich. 213; 63 N. W. 78. Where a claim was not rejected for the reason that it was not verified, it was said that the defect was therefore waived. In Canfield vs. City of Jackson, 70 N. W. 444, the defense was not set up until the case was

tried. It was then raised in an application for a new trial. It was held that was too late. The case of Griswold vs. City of Ludington, 74 N. W. 663, in a case much like this, the claim was presented. The council did not do as much, nor take as formal action in relation to it as counsel offered to prove was done in this case. The claim was not verified. The court said 'a waiver is a mixed question of law and fact, and each must necessarily depend much upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but, when there is any evidence, the Jury must determine what the intent of the party was, as a waiver is usually one of intent, as indicated by the acts and declarations of the party.' It was held the council might waive the verification of the claim and the court should have submitted the case to the jury, whether it had done so or not. In this case, if counsel could show what he offers to show, the question would have been submitted to the jury to decide whether there was a waiver on the part of the council."

The other cases cited directly sustain our contention and we will not trouble the court with quotations from them.

The position of counsel for the defendant, that the presentation of verified account cannot be waived, is clearly unsound. If it could be waived under the law in any way, it may be waived under

the circumstances alleged in the complaint.

In the case of Borghart vs. Cedar Rapids, Iowa, 68 L. R. A. 306, it is held that failure to plead in defense of an action for damages for closing a highway, that a verified account thereof was not presented to the City Clerk, is a waiver of the defense.

It is held in the case of O'Connor vs. Fon Du Lac, (Wis.) 53 L. R. A. 831, that if objection is not taken in a suit against the City, that a *verified* account had not been submitted to the council, such objection is *waived.*

If such objection is waived by failure to raise the question in the pleadings or at the trial of the suit, such objection is not jurisdictional, and is only a matter of detail in the transaction, and may be waived in the manner set forth in the complaint. We submit, therefore, first, that the case as presented by the complaint does not fall within the provisions of section 3283 and 3288 of the Revised Codes; and, second: that if it did, the defendant by and through its council, duly waived the presentation of a claim verified as provided by the statute.

III.

We shall next take up briefly a review of the decisions cited by counsel for the defendant in support of their contentions. We find but one case in all of those cited, in which it is even intimated

that the council might not waive the verification of the claim, and that is the case of Richardson vs. Salem (Ore.) 94 Pac. 34.

A careful examination of this opinion and a comparison of the statute of Oregon and Section 3283 Revised Codes, we believe will demonstrate the inapplicability of this decision to the matter before the Court. The statute of Oregon provides "No claim against the City shall be paid until it is first itemized and verified." Our statute provides: "And any claim or demand not so presented at the time aforesaid, is forever barred." The council has no authority to allow any account or demand not so presented." The difference between these two statutes seems to us to be very apparent, and this conclusion more especially applies when we read the remainder of section 3283 which provides: "Nor must any action be maintained against the City or Town for or on account of any demand or claim against the same, until such demand has first been presented to the council for action thereon." Taking section 3283 as a whole it provides: "First: that all accounts and demands shall be first duly itemized and verified, and must be presented within one year from the date they accrue. Two: Any claim or demand not presented within one year is forever barred. Three: That the council has no authority to allow any account or demand not so presented. Fourth: No action can be maintained against the City on account of any claim or demand, unless such

demand shall have first been presented to the council.

But, again, when we compare the language of the court in that case with the language of our own Supreme Court in the case of Dawes vs. City of Great Falls, supra, we insist that the case at bar is absolutely withdrawn from the decision in the Richardson case. It was insisted in the Richardson case that the itemizing or verifying the claim were not conditions precedent to bringing an action thereon, and that they were matters of defense that might be waived. The Court said "With reference to this proposition, *if setting out the items of the account and verifying the same were only for advice and guidance of the auditing officer, possibly he might waive them.*" Our own Supreme Court, in the Dawes case, held the purpose of the Statute was for auditing the claim or account. So that, we must conclude that the case at bar comes within the exception noted in the Richardson case.

In each and all of the other cases cited by counsel, it is held simply that the presentation of a claim to the City Council (In cases where such presentation is required by the statute) is a condition precedent to the right to bring suit against the City thereon. This we do not deny. The principle seems to be uniformly supported by the authorities wherever it has been before the courts. There is, however, a great difference between the principle announced by these authorities and the case at bar.

Here the account was presented, and the condition precedent was complied with.

On page 9 of the brief, the case of First Nat. Bank v. Custer County, 7 Mont. 464, is cited; and also that of Powder River Cattle Co. vs. Custer County, 9 Mont. 145. Neither of said cases is applicable to the action at bar; in the first case a complaint, which failed to allege that a claim had been *presented,* was held defective. In the Powder River Cattle Co. case, the claim against the county was never *presented.* Both are inapplicable to the facts in the suit at bar, because there is absolutely no question here as to both pleading and proof of *presentation; verification* was the only question at issue.

On pages 9, 10 and 11 of the Brief, three Montana cases, arising against the City of Helena, in litigation in connection with the waterworks controversy and electric light plant, are quoted from. A brief reference to said decisions, and their history, and bearing in mind the use of the quoted language as applied to the particular facts there under consideration, shows their utter inapplicability to the case at bar; and such was evidently the opinion of Judge Hunt, who, but a short time previous to the rendition of his decision herein, had had the said Helena cases before him in connection with the water litigation afterwards taken on appeal to this court, involving in the first hearing before him, the consideration of what is a debt or not a debt,

within the meaning of the constitutional inhibition against municipal indebtedness, as well as the statutory provisions found in the sections quoted (formerly Sections 4811 and 4812 of the Political Code).

The most that can be claimed for said Montana cases is to hold that the provisions of sections 3283 and 3288 are mandatory. But such statutes may be mandatory and yet the acts and conduct of the city constitute a waiver of such requirements, and operate as an estoppel.

The case of Naylor vs. McColloch (Ore.) 103 Pac. 68, does not hold that the council cannot waive a verification of the claim. It does hold that it is *difficult* to see how certain requirements of the Sumpter City charter can be waived, such as *presenting* the claim to the Recorder with the necessary evidence, that such Recorder *shall* report at the *next* council meeting with any suggestions, and that the claim *must lay over* until the next council meeting *before* it can be paid.

In reference to Campbell vs. Brackett (Ind.) 90 N. E. 777, a careful reading will show that the Court does not hold that the claim was void because *not verified.* The action was brought to recover $400.00 illegally paid a city attorney as extra compensation shortly before the expiration of his term; the claim was neither itemized nor verified, and was allowed at the *same session* at which it was presented, when the statute required it to be presented

at least *five days before* the session of the council at which it was allowed; and the statute not only made it unlawful to violate any of its provisions, but also made it a *criminal act* for any city officer to violate its provisions directly or indirectly, under penalty of fine and removal from office. The basis of the decision is shown in the concluding paragraph as follows:

"The statute we are here considering is a salutary one, enacted for the protection of the public against scheming and unscrupulous officers, as well as a protection to honest officers and employes of a town, *by affording a means and opportunity for investigation of each claim filed before its allowance. It was enacted to prevent such hasty action as is here shown;"* thus completely distinguishing it from the case at bar, in which not even a suggestion of fraud, haste, lack of consideration, dishonesty, diversion of funds, etc., has been or can be made.

Bingham v. First National Bank, 122 Fed. 16, is inapplicable to the suit at bar. That case is authority for the proposition that an Idaho statute requiring that "county *warrants must* specify the liability for which they are drawn, and when it occurs" is mandatory; that county warrants failing to contain such statements were void on their face, and would not, of course, suport an action against the county. The language quoted from said decision by appellant's counsel will be found on page 22 of the 122nd Fed., and we believe it is but fair to ob-

serve that the language, quoted on page 15 *of the brief,* was employed by the court with reference to *county warrants,* as will be seen from the next paragraph following at the bottom of page 22, all of page 23, and the remainder of the opinion on page 24, where the following self-explanatory language is found: "The present action being based *solely* on the *alleged* warrants, and as they *omit matter made essential* by the statute of the state, under which they purport to have been issued, they must be adjudged *invalid.*"

Thus the court apparently emphasizes the fact that the action "was based solely on the alleged warrants," thereby leaving open to fair inference what might have been the result in a different form of action.

In re Farell, 36 Mont. 254, cited on page 16, has clearly no application, in any aspect, to the facts and propositions involved in the suit at bar.

On pages 16-17 of the brief, the attempt to circumvent several of the Michigan decisions is dexterous, but ineffectual, as will appear from a reading of the decisions themselves. To illustrate: It is claimed that in Foster vs. Bellaire, the contention that the statute was mandatory was denied. That which was denied was not that the "statute is mandatory." To quote the exact language of the court: "It is insisted by counsel that the requirements of the statute are mandatory *and cannot be waived by the common council.* (Italics ours.) The precise

question presented by this case was before the court in Griswold vs. Ludington, 116 Mich. 401, 74 N. W. 663, and was decided against the contention of the counsel for the defendant. See also Wright vs. Village of Portland, 118 Mich. 23, 76 N. W. 141 and cases there cited. Sacks vs. Railway Co. (Mich.) 84 N. W. 314; Leach vs. Railway Co. (Mich.) N. W. 316."

Council's significant omission (whether inadvertently or otherwise) of the words just italicized, —*"and cannot be waived by the common council"* is fatal to their contention. The Michigan attorneys insisted that the statute being mandatory, its provisions could not be waived. But the courts denied such contention. It thus appears that while the courts unquestionably recognize such statutes as mandatory, the contention that such provision could not be waived was denied; for there can be absolutely no question, that from an examination of the Michigan cases themselves, it will be seen that the statutes were mandatory, and the courts held, as did Judges Hunt and Bourquin, that nevertheless the action and conduct of the city, under the facts, constituted a waiver.

So in the Griswold case, it is true, as counsel claim, that Canfield vs. City of Jackson, 70 N. W. 444 is cited; but it is apparent from a reading of the Griswold decision, that it rests not alone upon the Canfield case, which is incidentally cited, but upon clear logic, sound reasoning, and common

honesty, by refusing to permit escape from an honest obligation, through attempted technical evasion.

* * * * * * * * * *

The views of both the District Judges were legally correct and substantially just. The judgment should be affirmed.

Respectfully submitted,

EDWARD HORSKY,

Attorney for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an Incorporated City of the Third Class of the State of Montana, formerly the TOWN OF FORSYTH,

Plaintiff in Error,

vs.

E. W. CRELLIN, W. H. JACKSON and B. N. MOSS, Co-partners Doing Business Under the Firm Name and Style of DES MOINES BRIDGE & IRON COMPANY,

Defendants in Error.

Petition for Rehearing.

TO THE HONORABLE
THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Your petitioner, the City of Forsyth, plaintiff in error in said above entitled cause, respectfully asks the court to grant your petitioner a rehearing of said cause, upon the following grounds:

1. The question whether sections 3283 and 3288 of the Revised Codes of Montana are applicable to claims and demands against cities and towns, based on contracts made and let pursuant to the provisions of sections 3278, 3279, 3280 and 3281 of the Revised Codes, was not presented nor made an issue in the case. On the contrary, the pleadings are based, and the trial of the case proceeded, upon the theory that sections 3283 and 3288 are applicable, but a recovery was allowed upon the ground that the requirement of presenting the claim or demand of the defendant in error, "accompanied by an affidavit," could be waived, and was waived, by the City Council.

2. The only question presented by the record in this case for the determination of this court was the correctness of the ruling of the trial court in holding that compliance with the requirements of sections 3283 and 3288 of the Revised Codes of Montana could be waived, and was waived, by the Council of the City of Forsyth. It was not claimed or contended, nor was a suggestion made, or intimation given, in the court below, nor upon the hearing of the case in this court, that the provisions of said sections were not applicable to claims and demands based upon contracts made and let pursuant to sections 3278, 3279, 3280 and 3281 of the Revised Codes, and the plaintiff in error was not, and has not been, afforded an opportunity to be heard upon the proposition on which this court decided the case.

3. The decision of the court eliminates from the operation of section 3283 and 3288 of the Revised Codes of Montana all claims and demands against cities and towns on contracts made and let pursuant to the provisions of section 3278 of the Revised Codes, and is in conflict with the decisions of the supreme court of the state of Montana in which said section 3283 and 3288 and said section 3278 have been construed.

I.

We respectfully invite the attention of the court to the fact that it was conceded throughout the proceedings in the trial court that the provisions of sections 3283 and 3288 of the Revised Codes of Montana are applicable to the claim of the defendant in error, and the only ground urged, upon which it was sought to escape compliance with the requirements of the statute, was that such compliance had been waived. In their complaint, after averring that the Council considered and acted upon the claim,

"as regular in form and properly presented,"

the plaintiffs allege,

> "that whatever, if any, objection there might have been to the form of said final estimate, account, or claim, *or to the presentation there-*

> *of,* and amount theerof, were by the action of said defendant, by and through its City Council, *duly waived,* and defendant is estopped and cannot be heard to make any objection in the premises.'' (Tr. p. 8.)

The sufficiency of the complaint was challenged by demurrer, based upon a failure to allege presentation of the claim in manner and form as required by the statute. In overruling the demurrer Judge Hunt held that the statute applied, but considered the complaint to be sufficient, because:

> ''The presentation of the final estimate to the council fulfilled the essential requirements of section 3283 of the Revised Codes,'' (Tr. p. 47).

And in that connection, the learned Judge further said:

> ''Presentation therefore must be had as a condition precedent to the maintenance of an action. But the provisions which call for the accompaniment of an affidavit relate to the manner in which the account or claim presented shall be supported.'' (Tr. p. 48).

The answer affirmatively alleged failure to comply with the statutory requirements, and so fully was it conceded on all sides that sections 3283 and 3288 of the Revised Codes were applicable, that on

the day of the trial, January 22, 1913, and after an objection to the introduction of evidence in support of the complaint, as it then stood, had been denied, the defendants in error, plaintiffs below, applied for and obtained leave to amend the complaint, and did amend it, by alleging presentation of the claim, duly itemized, (Tr. p. 33),

> "accompanied by an affidavit stating the same to be a true and correct account against said town for the full amount for which the same was presented, and that said claim and demand accrued as set forth," (Tr. p. 34).

The plaintiff failed to sustain the burden of proof upon this issue, but the court nevertheless permitted a recovery, not, however, because sections 3283 and 3288 were inapplicable, but because the

> "affidavit was waived by the consideration of these claims by the City," (Tr. p. 68).

The finding of the trial court so made was a finding upon the issue squarely presented by the pleadings and proof, and upon the issue on which the case was submitted to this court. It was for the purpose of securing a review by this court of this particular ruling of the trial court, and for that purpose only, that the case was brought here. The error assigned was that,

> "The United States District Court, in and

for the District of Montana, erred in holding and deciding that the City Council of the City of Forsyth had the right and authority to waive compliance with the provisions of section 3283 and section 3288 of the Revised Codes of Montana," (Tr. p. 72).

No reference was made at any time, either in the court below, or in this court, to sections 3278, 3279, 3280 and 3281 of the Revised Codes, nor had it ever been claimed or contended, intimated or suggested, that these sections of the Code had the remotest bearing upon the question presented to this court for determination by the record of the case. It was tried in the court below, and heard and submitted here, upon the theory that sections 3283 and 3288 were applicable, and the only disputed question was whether compliance with their requirements could be waived. The action was not litigated at any stage upon any other theory, and, as was said by the supreme court of Indiana, in the case of Feder v. Field, 20 N. E. on page 131:

> "The law is well settled that a complaint must proceed upon a definite theory; that the case must be tried on the theory constructed by the pleadings, and such a judgment as the theory warrants must be rendered, and no other or different one."

And, as was said by the circuit court of appeals,

for the eighth circuit, in Illinois Central R. C. v. Egan, 203 Fed. on page 939:

> "Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory."

II.

Sections 3283 and 3288 of the Revised Codes require that "all accounts and demands" must be presented to the Council "duly itemized and accompanied by an affidavit," and "any *claim* or demand *not so presented*" within one year after the same accrued is forever barred. By subdivision 63 of section 3259 of the Revised Codes of Montana, the Council is given plenary power,

> "To make any and all contracts necessary to carry into effect the powers granted * * * and to provide for the manner of executing the same,"

but the general authority so conferred to make contracts is subject to the limitations and restrictions contained in section 3278, which requires all contracts for work, supplies and materials involving an expenditure exceeding $250.00 to be let to the lowest responsible bidder. That the only purpose of sec-

tion 3278 was to prescribe the mode of making and entering contracts exceeding the amount of expenditure therein mentioned was expressly held by the supreme court of Montana, in Missoula St. Ry. Co. v. City of Missoula, 47 Mont. on page 95, where the court, in discussing the provisions of subdivision 63 of section 3259, and of section 3278, says:

> "The mode of exercising the power granted by the former section is subject to the limitation prescribed in the latter."

And, so it was held by the same court, in Helena Water Works Co. v. City of Helena, 31 Mont. 243, a case involving the making of a contract under the provisions of said section 3278 of the Revised Codes, (the very notice calling for bids pursuant to the requirements of said section 3278 appearing on page 244 of the reported case), in which it was intended to make payments for supplies and materials furnished in cash, that the business of the city could not be managed or carried on in that way, because, by the provisions of section 3283 and 3288 of the Revised Codes,

> "*Every expenditure* of public money made by it must be made under the very eyes of its inhabitants, anyone of whom is afforded an opportunity to inspect the items of the proposed expenditure and register his objection to such as may appear to him unwise or un-

> necessary; for *in such case* every item of proposed expenditure must be incorporated in an itemized bill, *duly verified,* filed with the City Council, audited and allowed before payment can be ordered."

So, likewise, in Palmer v. City of Helena, 40 Mont. 498, the contract was one which the City was about to make, pursuant to the provisions of section 3278, the Mayor and City Council having

> "proceeded to call for sealed bids as a preliminary step for letting contracts for the purchase of materials, apparatus and machinery to be used in the installation of a lighting plant. * * * The intention was to let contracts for the purchase of the materials required and proceed at once to the installation of the plant. By the terms of the advertisement, the materials were to be paid for in cash."

The supreme court affirmed the action of the trial court in enjoining the City from making the proposed contracts, upon the ground that under the provisions of section 3283 and 3288,

> "all claims against it for services rendered or materials furnished must be audited and allowed as such before they can be paid, and thus become debts within the meaning of the prohibition."

There is nothing in section 3278, or any of the succeeding sections referred to by this court in the decision rendered in the case at bar, regarding the management of the fiscal affairs of cities and towns, but, as was said by the supreme court of Montana, in the Missoula Street Railway Company case, *supra,* these sections simply prescribe the mode in which contracts involving an expenditure exceeding $250.00 shall be made. What is more, as has been pointed out, the supreme court of Montana has expressly held that claims and demands, based upon such contracts, are governed and controlled by the requirements of section 3283 and 3288 of the Revised Codes.

See, also:

Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437.

III.

The effect of the construction placed by this court upon sections 3278, 3279, 3280 and 3281 of the Revised Codes of Montana eliminates from the requirements of section 3283 and 3288 all claims and demands arising upon contracts let by cities and towns, pursuant to the provisions of section 3278. No question was presented by the record calling for a construction of that provision of the Code, and

there was no issue raised requiring a determination of its purpose and effect. No opportunity was afforded the plaintiff in error to argue or discuss the proposition upon which the decision of this court is made to turn, because, as already pointed out, there was no claim or contention made at any time that sections 3278-3281 had any bearing on the case. Besides, the only object which section 3278 was intended to serve is, as stated by the court in Ford v. Great Falls, 46 Mont. 309,

> "to prevent favoritism and to secure to the public the best possible return for the expenditure of the funds which the property owners are required to furnish, through the payment of taxes and assessments."

That this is the only purpose which a statute like section 3278 of the Revised Codes of Montana is intended to serve has been uniformly declared by all the courts in which the question has been considered and determined. Judge Dillon, in the last edition of his work on municipal corporations, (2 Dillon Mun. Corp. par. 802) states the rule as follows:

> "In discussing the nature of the *contracts which are excepted* from the operation of statutes requiring competitive bidding, the court has said that the purpose of the statute is to insure economy in the public administration, and honesty, fidelity, and good morality in the ad-

ministrative officers. Competitive offers or bids have *no other object* but to insure economy and exclude favoritism and corruption in the furnishing of labor, services, property, and materials for the uses of the city. *This is the only purpose of the statutes, and when this effect is given to them, nothing further is needed.*" (Italics ours).

For these reasons we respectfully ask that a rehearing of said cause be granted, in order that there may be afforded to the plaintiff in error an opportunity to be heard upon the question whether sections 3278-3281 have the effect given them by this court, and operate to relieve holders of claims, based upon contracts, made pursuant to section 3278 of the Revised Codes of Montana, from a compliance with the mandatory requirements of section 3283 and 3288 of said Codes.

Respectfully submitted,

F. V. H. COLLINS, and
GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error and Petitioner.

We, the undersigned, M. S. Gunn, Carl Rasch and E. M. Hall, counsel and attorneys for the City of Forsyth, the plaintiff in error and petitioner, do hereby certify that in our judgment the foregoing

petition for a rehearing is well founded and that the same is not interposed for delay.

Counsel for Plaintiff in Error and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CITY OF FORSYTH, an incorporated City of the Third Class of the State of Montana, formerly the Town of Forsyth,

Plaitiff in Error,

vs.

E. W. CRELLIN, W. H. JACKSON, and B. N. MOSS, copartners Doing Business under the Firm Name and Style of DES MOINES BRIDGE & IRON COMPANY,

Defendants in Error.

ANSWER TO PETITION FOR RE-HEARING.

I and II.

On page 3 of the petition, it is claimed, "that it was conceded throughout the proceedings in the trial court that the provisions of sections 3283 and 3288 of the Revised Codes of Montana are applicable

to the claim of the Defendants in Error, and the only ground argued upon which it was sought to escape compliance with the requirements of the statute are that such compliance had been waived." It is also claimed (page 6) "that the action was not litigated at any stage upon any other theory."

As to both of these assertions, and the accuracy of the facts claimed in alleged grounds I and II (pages 1 and 2 of the petition), we respectfully but *emphatically* join issue with the plaintiffs in error.

For the information of the court upon these features, we herewith file as an exhibit a certified copy of the typewritten brief of Defendants in Error, in opposition to the city's demurrer in the lower court, marked "Exhibit A." It will be seen therefrom on pages 1, 2, 3, 4 and ending on page 5, that the identical proposition in question was litigated in the *trial* court.

To quote from our brief in the trial court:

"THAT IT WAS NOT NECESSARY, UNDER THE CIRCUMSTANCES DISCLOSED BY THE COMPLAINT IN THIS ACTION, FOR PLAINTIFFS TO PRESENT ANY CLAIM TO THE CITY COUNCIL UNDER THE PROVISIONS OF SECTIONS 3282 AND 3288 OF THE REVISED CODES."

And again in *this* Court, in our brief, the very first subdivision thereof (I), pages 5 to 8 inclusive,

deals with the same proposition (page 5) under the following caption:

"UNDER THE FACTS SHOWN IT WAS NOT NECESSARY FOR DEFENDANTS IN ERROR TO PRESENT ANY CLAIM TO THE CITY COUNCIL."

It may be that counsel for plaintiffs in error did not attach much importance to the point in question and apparently such was their attitude on oral argument in the appellate court. But merely because the learned counsel *so* regarded the point, affords no valid reason why this court should now be asked to grant a re-hearing.

II.

At the bottom of page 8 and top of page 9, there is an alleged quotation from the case of Helena Waterworks Co. vs. City of Helena, 31 Mont. 243, 244, but a reading of such case discloses no such language. There is such language in *another* Helena case, which was under different conditions of fact and was canvassed in the briefs of both plaintiff and defendants in error herein. And also upon oral argument, the court will probably recall the undersigned dwelt at length upon the *history,* and the particular facts involved in the Helena cases, in the water and light controversies from that city.

etc., and the closing retort thereto by opposing counsel was in substance: "This suit does not involve the troubles of the City of Helena. No doubt the City of Helena was very badly treated by the water company in those cases." We advert to this by way of reminding counsel that all that is now advanced under this head has heretofore been orally discussed, and was considered in the briefs herein.

Moreover, the court's opinion herein itself affords the best answer upon this branch of the petition for re-hearing wherein such cases were considered for the purpose of the argument for all that counsel claimed for them. It thus appearing that there is neither anything new or which has not been heretofore presented, discussed and correctly decided herein, no tenable reason for a re-hearing has thus far been urged.

III.

It is next asserted that the construction placed by this court upon Sections 3278, 3279 and 3281 of the Montana Revised Codes eliminates from the requirements of sections 3283 and 3288, upon all claims arising upon contracts with cities and towns pursuant to section 3288. No such result will necessarily follow. Again it is erroneously claimed that —"no opportunity was ever afforded the plaintiff in error to argue or discuss the proposition upon

which the decision of this court is made to turn," (page 11 of Brief).

In the light of our typewritten brief in the court below, and our printed brief on appeal herein, and the oral arguments on appeal, we again reply to counsels' statements as probably being an unconscious lapse of memory. It is apparent that this Court in the able opinion rendered holds that under such *concrete* facts as appear in this suit, it was not designed or intended that sections 3283 and 3288 should apply to claims against the city similar to the one in suit. And while it might be necessary to *present* a claim to the council before suit, "yet it was not the purpose of the statute that such claims should be *verified* as a condition precedent to the city council's allowance or to the institution of an action against the city." In the case at bar, confessedly the Bridge Company on every occasion *presented* its claim. Moreover, had there been any possible question that the bids for the contract had not been regularly advertised for, the contract regularly awarded, proper steps taken for alterations, etc., as required by sections 3278, 3279, 3280 and 3281, it may be assumed that the same would have been pleaded as defenses in the answer; otherwise the presumption must obtain that the contract was regularly awarded, entered into and carried out. Therefore to quote counsel's quotation (page 11 of brief), from Ford vs. Gt. Falls, 46 Mont. 369,

the purpose of the statutes "to prevent favoritism, and to secure to the public the best possible return for the expenditure of the funds which the property owners are required to furnish through the payment of taxes and assessments" was fully subserved; the public having thus received such results, the empty formula of an affidavit to a claim already presented pursuant to a contract on which there had theretofore been five payments, and tests and acceptance of the water system having been made and full opportunity afforded for any possible objection and none registered, would mean at the best technicality carried to the extreme of being ridiculous. With an opinion that has twice been sustained in the trial court, which has again been justly affirmed in the Appellate Court, and which is not in conflict with the decisions of the Montana Supreme Court, we respectfully submit that no grounds for re-hearing have been presented and the petition should be denied.

Very respectfully,

EDWARD HORSKY,
Attorney for Defendants in Error.

Feb. 18, 1914.